

*United States Court of Appeals
for the Second Circuit*



APPENDIX

ORIGINAL

74-1357

B
PJS

United States Court of Appeals
FOR THE SECOND CIRCUIT

AMERICAN BRANDS, INC.,

Plaintiff-Appellant,
against

PLAYGIRL, INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

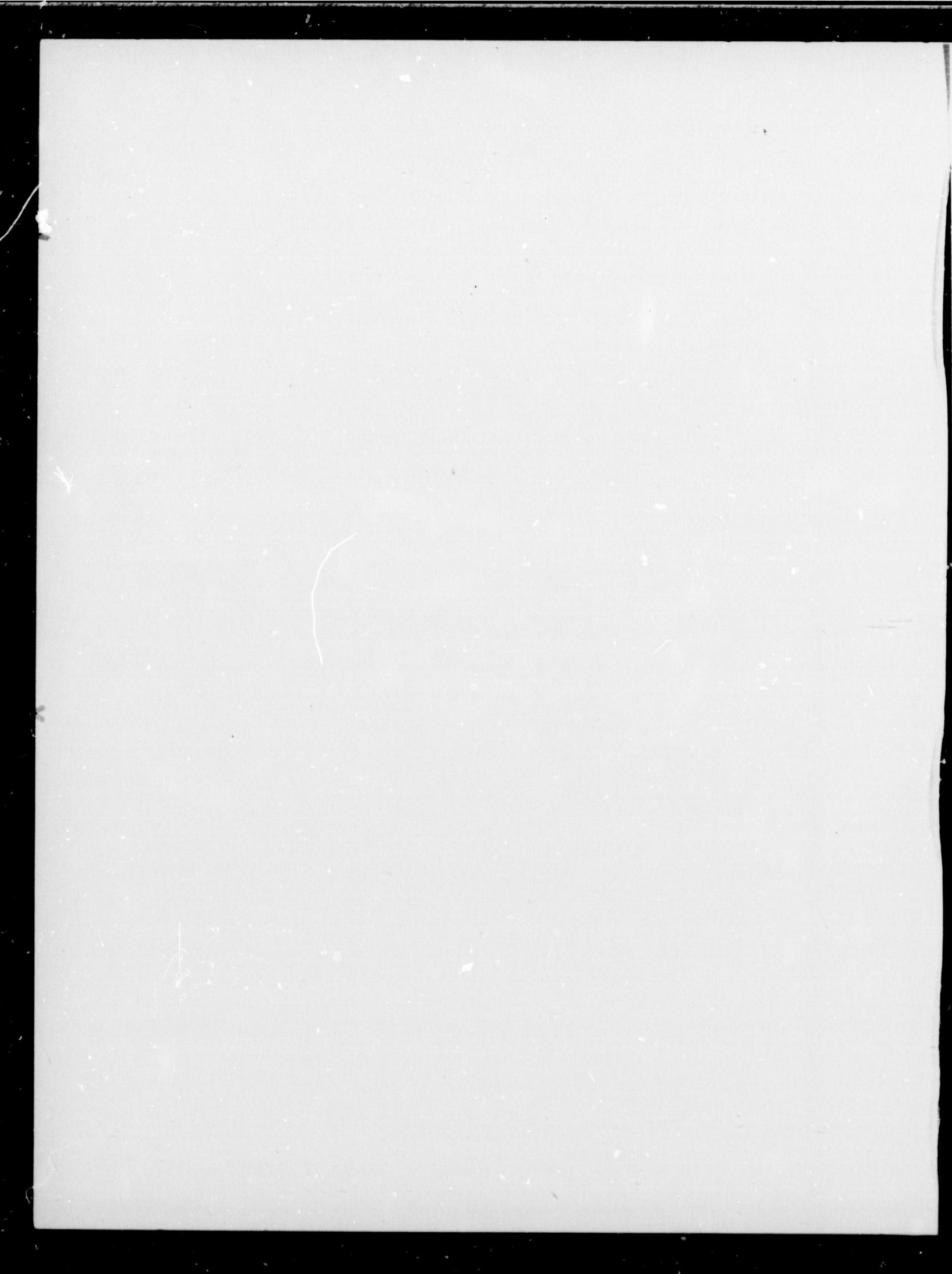
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PAGINATION AS IN ORIGINAL COPY

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DOCKET ENTRIES

CIVIL DOCKET
UNITED STATES DISTRICT COURT

Jury demand date:

74 CIV. 948
JUDGE BRIEANT

C. Form No. 104 Rev.

| TITLE OF CASE | ATTORNEYS |
|-----------------------|---|
| AMERICAN BRANDS, INC. | For plaintiff: |
| vs | Chadbourne Parke Whiteside & Wolff |
| PLAYGIRL, INC. | 30 Rockefeller Plaza, NYC 10020 541-5800 |

A 2

Docket Entries

AMERICAN BRANDS, INC. -v- PLAYGIRL, INC.

BRIEANT, J.

74 CIV 943

ORDER TO SHOW CAUSE FOR PRELIMINARY INJUNCTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x

AMERICAN BRANDS, INC., :
Plaintiff, :
-against- : ORDER TO SHOW CAUSE
PLAYGIRL, INC., : FOR PRELIMINARY INJUNCTION
: 74 Civ. 948
Defendant. : (CLB)

----- x

Upon the annexed affidavit of Paul G. Pennoyer,
Jr. duly sworn to the 1st day of March, 1974; and upon *a copy of*
the Order to Show Cause duly signed by the Honorable
Justice George Starke of the Supreme Court of the State
of New York, with the Summons and Verified Complaint in
this action and the affidavit of Norman Chester, sworn to
the 12th day of February, 1974 annexed thereto, said
Order to Show Cause having been signed before the re-
moval of this action from said Court, the same being
annexed hereto as Exhibit 1; and upon Plaintiff's Memo-
randum of Law in Support of Plaintiff's Motion for a
Preliminary Injunction, annexed hereto as Exhibit 2; and
upon Defendant's Memorandum of Law in Opposition to
Plaintiff's Motion for a Preliminary Injunction, annexed
hereto as Exhibit 3; and upon the affidavit of Ira
Ritter, sworn to the 16th day of February, 1974, annexed
hereto as Exhibit 4, and upon the affidavit of Carl Vann,

Order to Show Cause for Preliminary Injunction

sworn to the 15th day of February, 1974, annexed hereto as Exhibit 5; and upon the Petition for Removal of this action (without exhibits thereto), annexed hereto as Exhibit 6; it is

ORDERED that the defendant, Playgirl, Inc., before show cause, at a motion term of this Court, to be held in Room 406, United States Court House, Foley Square, New York, New York on the 6th day of March, 1974 at 2:15 o'clock in the afternoon of that day or as soon thereafter as counsel may be heard, why a Preliminary Injunction should not be made and entered herein restraining and enjoining the defendant, Playgirl, Inc., pending the determination of the issues in this action from

(1) Refusing to publish plaintiff's advertising on the back cover of its magazine, PLAYGIRL, in the issue of said magazine to be dated June 1974 and each of the next eleven monthly issues, and thereafter in accordance with the contract between plaintiff and defendant dated January 26, 1973;

(2) Accepting, or incurring any contractual obligation to accept, advertising for publication on the back cover of its

Order to Show Cause for Preliminary Injunction

magazine, PLAYGIRL, for the issue to be dated June 1974 and any subsequent issue; and further show cause why pending the determination of the motion brought on by this order to show cause, and the entry of an order thereon, the defendant, Playgirl, Inc., should not similarly be stayed, enjoined and restrained as more particularly described in the annexed form of order.

PERSONAL

IT IS FURTHER ORDERED that ^{service of a copy} of this order and the annexed affidavit upon the defendant, Playgirl, Inc., at the office of its counsel of record appearing herein on or before March 5th, 1974 be deemed good and sufficient service thereof. ^{By 4:45 PM}

Dated: March 4, 1974

Issued at 1:15 P.M.

/S/ CHARLES L. BRIEANT, JR.
U.S.D.J.

AFFIDAVIT OF PAUL G. PENNOYER, JR. IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

S A M E T I T L E

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

PAUL G. PENNOYER, JR., being duly sworn, deposes
and says:

1. I am an attorney and member of the firm of Chadborune, Parke, Whiteside & Wolff, counsel for plaintiff herein American Brands, Inc.
2. On February 27, 1974 this action was removed to this court from the New York Supreme Court by petition while plaintiff's motion for a preliminary injunction, brought on by Order to Show Cause, was sub judice.
3. This affidavit is submitted in support of plaintiff's application for an Order to Show Cause, said Order being in substantially the same form as an Order which had already been signed by the State Court prior to removal of this action.
4. 28 U.S.C. 1450 provides that "All injunctions, orders, and other proceedings had in such [removed] action prior to its removal shall remain in full force and effect until dissolved or modified by the district court."
5. Accordingly, the prior Order to Show Cause

Affidavit of Paul G. Pennoyer, Jr.

should be deemed in force and effect, and therefore the purpose of the Order requested herein is merely to set an immediate date for this Court to hear plaintiff's motion which is, in effect, already pending.

6. This action was commenced on February 13, 1974 in the Supreme Court of the State of New York by the aforementioned Order to Show Cause duly signed by the Honorable Justice George Starke and served personally on defendant that day.

7. As more particularly described in the Affidavit of Norman Chester, Media Director of American Brands, Inc., duly sworn to on the 12th day of February, 1974, the defendant Playgirl, Inc. solicited advertising from plaintiff during the period prior to the publication of the first issue of said magazine and as a result defendant and plaintiff entered into an agreement in writing, dated January 26, 1973, whereby plaintiff agreed to advertise in defendant's magazine. The Affidavit of Mr. Chester is annexed to the Order to Show Cause, signed by Justice Starke a true copy of which is annexed to the Order requested herein.

8. The Agreement of January 26, 1973 (hereinafter "Agreement") provides that plaintiff purchase the back cover page of each of the first twelve issues of Playgirl Magazine and to pay for same and further provides that plaintiff "have the continuing and irrevocable right,

Affidavit of Paul G. Pennoyer, Jr.

at our option, to buy the back cover of Playgirl each and every twelve month period, for each issue of Playgirl within that period, for as long a period as Playgirl shall continue to be published."

9. In accordance with the Agreement defendant has published or agreed to publish plaintiff's advertisements on the back cover of each of the first twelve issues of Playgirl Magazine and plaintiff has paid defendant, promptly when properly billed, for the advertisements published.

10. In accordance with the Agreement, plaintiff has duly notified defendant of its intention to exercise its option and to publish advertisements on the back cover of the twelve issues of Playgirl to be dated June 1974 through May 1975.

11. Notwithstanding the defendant's written Agreement and its subsequent acts of ratification, defendant has unequivocally refused to accept plaintiff's advertising for the issues to be dated June 1974 and thereafter.

12. Plaintiff has been advised that the publication date for the June 1974 issue of Playgirl Magazine is March 18, 1974.

13. Accordingly, in order to maintain its existing rights under the Agreement, plaintiff commenced this action in New York Supreme Court by an Order to Show Cause, seeking a determination of its rights under the

Affidavit of Paul G. Pennoyer, Jr.

law of New York and seeking to preserve those rights pending such determination.

14. Notwithstanding the deadline which defendant's schedule imposes on this matter, defendant has now twice delayed the plaintiff's best efforts to obtain a judicial determination of its rights prior to the March 18 deadline.

15. On February 19, 1974 in accordance with the previous Order to Show Cause, defendant's filed affidavits and a memorandum of law in opposition to plaintiff's motion for preliminary injunction, an oral argument was held before the Honorable Justice Hyman Korn of the Supreme Court of New York.

16. After oral argument, at the request of Justice Korn, a meeting was scheduled in the Justice's chambers between authorized representatives of the parties in order to reach a settlement; said meeting was held the following day; and no settlement was reached.

17. Upon failure to reach a settlement, Justice Korn announced his intention to expedite his decision, as called for by the urgent plea of the Order to Show Cause.

18. Counsel for defendant then requested time to file further points and authorities, having already filed such a Memorandum of Law at the time of the hearing.

19. Justice Korn allowed until March 1, 1974 for the filing of such further memoranda by defendant.

Affidavit of Paul G. Pennoyer, Jr.

At the time of the execution of this affidavit defendant's counsel has not served any such memoranda upon plaintiff's counsel.

20. If indeed no such memoranda is filed, defendant's counsel will have successfully delayed this determination for eight days, to plaintiff's possible prejudice, for no substantive purpose.

21. Defendant has now filed its petition removing this cause to this Court causing the necessity of duplicative efforts by counsel and judiciary alike.

22. Whereas defendant has appeared, argued, filed papers, attended a conference in chambers, requested time to file additional papers, this petition to remove at this time can certainly be viewed as a second effort to delay plaintiff's best efforts for a prompt judicial determination of its motion for a preliminary injunction.

23. Plaintiff seeks no more in this Order to Show Cause than has already been granted in the State courts. Whereas this case should be deemed removed in exactly the same posture it was in the State court, plaintiff should be entitled to have this motion decided as Justice Korn was prepared to decide it, without delay.

24. Because plaintiff's motion for a preliminary injunction is now pending in the Federal District Court rather than the New York State Court, it is appropriate to note that the standard for such injunctions are the

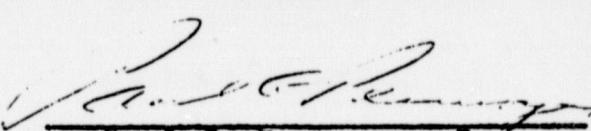
Affidavit of Paul G. Pennoyer, Jr.

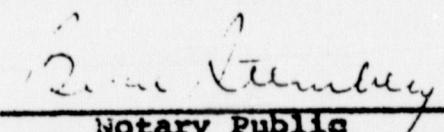
same in this court as in the New York courts under the CPLR.

25. The CPLR § 6301 provides for a preliminary injunction "where it appears that the defendant threatens or is about to do . . . an act in violation of the plaintiff's rights respecting the subject of the action and tending to render the judgment ineffectual", as more particularly set out in Plaintiff's Memorandum of Law in Support of Plaintiff's Motion for Preliminary Injunction. The standard is the same here; as this Court said in American Motorists Ins. Co. v. City Wide Transportation Co., 308 F.Supp. 1080, 1083 (S.D.N.Y. 1969), Lasker, J., [t]he purpose of a preliminary injunction is to preserve or restore the status quo pending final determination of the action after a full hearing."

26. Accordingly, plaintiff respectfully requests that this Court allow defendant no further delay and order that plaintiff's motion for preliminary injunction be brought on by Order to Show Cause, upon the papers already filed with the Supreme Court of New York, and annexed to the Order requested herein, at the earliest possible date.

Sworn to before me this
1st day of March, 1974:


Paul G. Pennoyer, Jr.


Diane Lemley
Notary Public

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EXHIBIT 1--SIGNED ORDER TO SHOW CAUSE IN NEW YORK
SUPREME COURT ANNEXED TO MOVING PAPERS

At a Special Term, Part II of
the Supreme Court of the
State of New York, in and
for the County of New York,
on the . day of February,
1974

PRESENT:

HON. GEORGE STALLARD
Justice

----- x
AMERICAN BRANDS, INC., :
Plaintiff, :
-against- : ORDER
PLAYGIRL, INC., : Index No. 2376/74
Defendant. :
----- x

Upon reading and filing the annexed affidavit
of Norman Chester, Media Director of American Brands,
Inc., duly sworn to the 12th day of February, 1974, and
a copy of the summons and verified complaint in this
action, duly verified by plaintiff the 12th day of
February, 1974, which is hereto annexed as an exhibit,

Let the defendant, Playgirl, Inc., show cause
before one of the Justices of this Court, at a Special
Term Part I of this Court, held in and for the County of
New York, at the Court House thereof at 60 Centre Street
in the City of and County of New York, on the 17th day of
February, 1974 at 10:00 o'clock in the forenoon of that
day or as soon thereafter as counsel may be heard, why an
order should not be made and entered herein restraining
and enjoining the defendant, Playgirl, Inc., pending the
determination of the issues in this action from

- (1) Refusing to publish plaintiff's
advertising on the back cover of its maga-

Exhibit 1 Annexed to Moving Papers

zine, PLAYGIRL, in the issue of said magazine, to be dated June 1974 and each of the next eleven monthly issues, and thereafter in accordance with the contract between plaintiff and defendant dated January 26, 1973;

(2) Accepting, or incurring any contractual obligation to accept, advertising for publication on the back cover of its magazine, PLAYGIRL, for the issue to be dated June 1974 and any subsequent issue.

1/14/74 1/1/74
~~BE IT ORDERED, that until the determination of~~
the motion brought on by this order to show cause, and
the entry of an order thereon, the defendant, Playgirl,
~~SHOULD NOT~~
Inc., be and it is hereby stayed, enjoined and restrained
from

(1) Accepting, or incurring any contractual obligation to accept, advertising for publication on the back cover of its magazine, PLAYGIRL, for the issue to be dated June 1974 and any subsequent issue.

Sufficient cause appearing therefor, let service of a copy of this order and the papers upon which it is based upon the defendant, Playgirl, Inc., at its offices at 16 East 48th Street in the City of New York, on or before the . day of February, 1974, be deemed good and sufficient service thereof.

Signed this -- day of February, 1974, at New York, New York.

ENTER

J.S.C.

AFFIDAVIT OF NORMAN H. CHESTER IN SUPPORT OF MOTION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----- x
AMERICAN BRANDS, INC.,

| | | |
|-----------------|---|------------------|
| Plaintiff, | : | <u>AFFIDAVIT</u> |
| - against - | | Index No. |
| PLAYGIRL, INC., | | |
| Defendant. | | |

----- x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

NORMAN H. CHESTER, being duly sworn, deposes
and says:

1. I am employed by The American Tobacco Company
Division of American Brands, Inc. (hereinafter "American")
as Media Director.

2. I submit this affidavit in connection with
American's motion for a preliminary injunction and other
relief.

3. I am familiar with the facts and circumstances
of this matter as more particularly set out below.

4. American manufactures and sells a wide range
of consumer products and advertises its products through
various media as an important aspect of its marketing pro-
gram.

5. Playgirl, Inc. (hereinafter "Playgirl") began
the publication of a new magazine, "Playgirl", in 1973 and
in anticipation of this publication Playgirl solicited
advertising from American at American's office in the City
of New York.

Affidavit of Norman H. Chester

6. Playgirl Magazine is a new entry to the magazine market, having published its first issue dated June 1973. To date Playgirl has only published ten monthly issues. Early in 1973, at a time when Playgirl Magazine was merely a speculative commercial prospect, before any issue had been published, Playgirl approached American seeking backing, in the form of advertising, for its new venture.

7. American agreed to be one of the crucial ground floor advertisers, buying a twelve month renewable contract for each of the back covers during the first publication year, and thereby providing Playgirl with a reliable source of income at a time when any income was crucial to the success of Playgirl. In return American required the important and expressly stated proviso that American have the option to purchase the corresponding twelve back covers in each successive twelve month period, as long as Playgirl Magazine continues to be published.

8. This renewal option was the single most important consideration to American in agreeing to purchase twelve consecutive back cover advertisements.

9. On January 26, 1973 American proposed in writing an agreement to purchase twelve consecutive back cover advertisements in Playgirl Magazine with the aforementioned vital option permitting annual renewal.

10. On February 2, 1973 Mr. Carl L. Vann, Advertising Director of Playgirl, accepted and agreed to the proposal dated January 26, 1973 and executed a copy of the proposal in my office at 245 Park Avenue, New York, New York.

Affidavit of Norman H. Chester

11. A copy of the agreement dated January 26, 1973 as executed by Mr. Vann on February 2, 1973 is attached hereto as Exhibit A (hereinafter referred to as the "Agreement").

12. The Agreement states that:

"Your acceptance below of this Agreement shall also serve to acknowledge our understanding [sic] that we have the continuing and irrevocable right, at our option, to buy the back cover of Playgirl each and every twelve month period, for each issue of Playgirl within that period, for as long a time as Playgirl shall continue to be published."

13. Under the terms of and in accordance with the Agreement Playgirl published advertisements for American's products on the back cover of the first ten issues of its magazine dated June 1973 through March 1974, respectively.

14. Under the terms of and in accordance with the Agreement Playgirl has accepted or agreed to accept further advertisements for American's products for publication on the back cover of the eleventh and twelfth issues of its magazine to be dated April and May 1974, respectively.

15. Under the terms of and in accordance with the Agreement American has paid Playgirl promptly when properly billed for all the advertisements published, a sum of money in excess of \$50,000.

16. By letter dated September 25, 1973, Playgirl advised American that it considered performance of its obligation to carry American's advertising on its back-covers as long as Playgirl Magazine continues to be published to be "against our policy". A copy of said letter is annexed hereto as Exhibit B.

Affidavit of Norman H. Chester

17. In subsequent discussions with Playgirl's officers and employees, I have firmly asserted American's intention to enforce its right under the Agreement to have its advertising appear on the back cover of Playgirl Magazine as long as Playgirl Magazine continues to be published.

18. By letter dated December 3, 1973 Playgirl advised American that "PLAYGIRL has elected to diversify its back cover" thereby demonstrating an intention to breach the Agreement. A copy of said letter is annexed hereto as Exhibit C.

19. By my letter dated December 13, 1973 American replied to Playgirl that American would "continue to exercise our rights to space in your magazine, established by the present agreement between us dated January 26, 1973." A copy of said letter is annexed hereto as Exhibit D.

20. By letter dated December 20, 1973 Playgirl replied to American stating that "PLAYGIRL will diversify its 4th cover advertisers effective with the June 1974 issue," thereby reiterating its intention to breach the Agreement. A copy of said letter is annexed hereto as Exhibit E.

21. By Registered Mail, Return Receipt Requested, on January 11, 1974 American replied to Playgirl by my letter stating that "we consider the contract between us dated January 26, 1973 executed by our Mrs. Fealey and your Mr. Vann, to be valid, binding and enforceable, and that we intend to take every action necessary to enforce such contract to its full extent." A copy of said letter is annexed hereto as Exhibit F.

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Affidavit of Norman H. Chester

22. On January 11, 1974 I personally handed a copy of my letter of that date to Mr. Leo J. Dean, Eastern Advertising Manager of Playgirl, in my office at 245 Park Avenue.

23. By letter dated January 17, 1974 Playgirl replied by proposing that American accept "all the available" back covers for the twelve month period from June 1974 through May 1975. Mr. Leo J. Dean clarified this proposal on January 18, 1974 when I called him on the telephone at his New York City office. He stated that three or possibly four back covers were being offered. A copy of said letter is attached hereto as Exhibit G.

24. By letter dated January 25, 1974 Mr. Leo J. Dean again asked American to accept fewer than the twelve back covers to which American is entitled during the twelve month period from June 1974 through May 1975. A copy of said letter is attached hereto as Exhibit H.

25. Playgirl has advised us that March 18, 1974 is the prospective deadline date for the submission of advertising copy for the June 1974 issue of Playgirl Magazine.

26. American will suffer serious and continuing loss and damage, in an increasing and indeterminable amount, for each month in which Playgirl fails to publish American's advertisement on the back cover of the Playgirl Magazine.

27. There is no way to precisely demonstrate and there is no accurate method to show the amount of monetary damage which results when an advertisement is not published.

Affidavit of Norman H. Chester

28. The back cover of Playgirl Magazine is a unique advertising property and American will not be able to obtain equivalent replacement advertising anywhere.

29. William James Miles, Jr., Executive Vice President and Director of National and International Advertising Sales for Playgirl Magazine has stated that:

"Our readership studies have shown that the median age of Playgirl readers is 24. This is the 'habit-forming' time of a consumer's life. The time when she decides which products work best for her. The time she develops the brand loyalties she will continue with throughout the years. This is the best time to reach these women with your product and your message. And, only Playgirl delivers this young, affluent and malleable female audience for your advertising message."

30. Playgirl has stated that its magazine is "Unconventional. Unprecedented. Unparalleled." "An original that stands alone among magazines for women."

31. The back cover is generally the most important advertising space in a magazine, and the back cover of Playgirl Magazine is especially valuable.

32. It is the generally accepted practice in magazine advertising that advertisers have the first option of renewal for space in corresponding issues in the following publication year.

33. The Agreement sets out that:

"In keeping with the generally accepted practice in magazine advertising, it is understood that the American Tobacco Company Division and its related companies are to have the first option of renewal of this space for the corresponding issues of the following year."

Affidavit of Norman H. Chester

34. Should Playgirl Magazine carry another advertiser on its back cover, that advertiser may claim that, in accordance with the accepted practice in magazine advertising, it is entitled to the first option of renewal for the subject space in the corresponding issues of the following year. Therefore, if Playgirl is permitted to breach its contract and publish any other advertising on its back cover, American would be in jeopardy of losing its future advertising space on the back cover of Playgirl Magazine.

35. American is obligated under the agreement to pay the same price that any other advertiser would pay, based on a schedule published by Playgirl, and therefore Playgirl will not suffer any loss of revenue for its back cover if this Agreement is unforced.

36. It is clear that American will be denied the benefit of its contract if Playgirl is not ordered to carry American's advertising as specified in the Agreement.

37. No previous application has been made for the relief sought herein.

Norman H. Chester
NORMAN H. CHESTER

Sworn to February 12, 1974

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EXHIBIT A--AGREEMENT DATED JANUARY 26, 1973 ANNEXED
TO AFFIDAVIT OF NORMAN H. CHESTER



PLAYGIRL, INC.
4055 WILSHIRE BOULEVARD
SUITE 420
LOS ANGELES, CALIFORNIA 90010

Gentlemen:

The American Tobacco Company

A DIVISION OF AMERICAN BRANDS, INC.

245 Park Avenue
New York, N.Y. 10017

JANUARY 26, 1973

JOHN WELLER
MARTIN & HART
131 SO. 31ST STREET
KENILWORTH, NEW JERSEY 07033

We hereby reserve for advertising the products of The American Tobacco Company Division and its related companies, space as follows, in PLAYGIRL.

| Brand | Space | Date | Position | Rate |
|-------|-------|------|----------|------|
| | | | | |

SEE SUPPLEMENT SHEET ATTACHED

Rate is based on: 600,000 PLUS CIRCULATION

The acceptance of this advertising is upon the definite and express agreement that, as to advertising herein provided for, as well as all other advertising of our products, you recognize the advertising agency placing it as an independent contractor; and you agree to look to the advertising agency for payment and hold harmless The American Tobacco Company Division and its related companies. We are, of course, bound to pay the agency. This is in accordance with the custom in the advertising business and such custom is, we understand, general and generally recognized, and recognized by you; but this agreement by you to hold us harmless is binding whether that is so or not; and is made as part of the consideration for placing this advertising.

In view of the foregoing, you are at liberty to cancel this agreement before any advertising is run if the agency placing it is not acceptable to you, without incurring any damages for cancellation.

It is understood and agreed that the rate for space used is the minimum rate at which a contract for a similar (equal or less) amount of space, for national display advertising to be published in a like position, can be secured; and that if at any time during the life of this contract you make a lower rate for such advertising, then this contract is to be completed at such lower rate from date reduced rate becomes effective.

In keeping with the generally accepted practice in magazine advertising, it is understood that The American Tobacco Company Division and its related companies are to have the first option of renewal of this space for the corresponding issues of the following year. *See Reverse Side.

We reserve a cancellation privilege as to the use of this space. WE HAVE THE RIGHT TO CANCEL THE SUBSEQUENT ISSUES WITHOUT PENALTY IF THE PREMIERE ISSUE IS UNSATISFACTORY TO US.

KINDLY ACKNOWLEDGE ACCEPTANCE on the reverse side of the duplicate copy of contract and return to this office.

Very truly yours,

J.B. Tracy
J. B. TRACY
CORPORATE MEDIA DEPARTMENT
The American Tobacco Company
A Division of American Brands, Inc.

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Exhibit A--Agreement

*YOUR ACCEPTANCE BELOW OF THIS AGREEMENT SHALL ALSO SERVE TO ACKNOWLEDGE OUR UNDERSTANDING THAT WE HAVE THE CONTINUING AND IRREVOCABLE RIGHT, AT OUR OPTION, TO BUY THE BACK COVER OF PLAYGIRL EACH AND EVERY TWELVE MONTH PERIOD, FOR EACH ISSUE OF PLAYGIRL WITHIN THAT PERIOD, FOR AS LONG A TIME AS PLAYGIRL SHALL CONTINUE TO BE PUBLISHED.

ACCEPTED: PLAYGIRL, INC.

BY: Millerman

TITLE: _____

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Exhibit A--Agreement

| <u>BRAND</u> | <u>SPACE</u> | <u>1973</u> <u>DATES</u> | <u>POSITION</u> | <u>RATE</u> |
|--------------|--------------|---|-----------------|----------------------------|
| TAREYTON | PAGE 4-COLOR | MAY JUNE, JULY, AUG., SEPT., OCT., NOV., DEC. | BACK COVER | \$ 26.00 C&W NO CHANGE |
| | | | BACK COVER | \$ 52.00 C&W \$4,500.00 |

10% DISCOUNT

IF ADDITIONAL ADVERTISING IN B&W OR COLOR IS USED RATE IS TO BE RATE EFF. JAN. 1973 FOR AS LONG A PERIOD AS RATE IS IN EFFECT ON ANY OTHER ADVERTISING ACCOUNT.

IMPORTANT

NO COUPON ADVERTISING IS TO APPEAR ON THE REVERSE SIDE OF OUR ADVERTISING.
NO INSERT CARD IS TO BE PLACED ON THE SAME SPREAD WITH ONE OF OUR ADS.
CIGARETTE BRANDS OF OUR MANUFACTURE SHOULD BE SEPARATED BY AT LEAST TWELVE (12) PAGES.

SEPARATE BY AT LEAST SIX (6) PAGES FROM ANY CIGARETTE ADVERTISING OR ANY ADVERTISING WHICH IS INCOMPATIBLE TO ANY OF OUR CIGARETTE ADVERTISING OR WHICH REFLECTS ADVERSELY UPON CIGARETTES.

ALL ADVERTISING TO BE POSITIONED AS SPECIFIED. IF UNABLE TO POSITION AS SHOWN YOU AGREE TO ADVISE THE APPROPRIATE ADVERTISING AGENCY PRIOR TO CANCELLATION DATES SPECIFIED HEREIN. BATTEN, BARTON, DURSTINE & OSBORN, INC., SHOULD BE NOTIFIED FOR TAREYTON.

AGENCY COMM. 15%
CASH DISC. 2%

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EXHIBIT B--LETTER DATED SEPTEMBER 25, 1973 ANNEXED
TO AFFIDAVIT OF NORMAN H. CHESTER

PLAYGIRL MAGAZINE FOR WOMEN

September 25, 1973

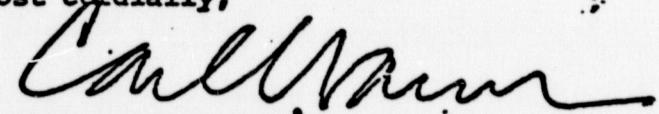
Ms. T. B. Fealey
Corporate Media Department
THE AMERICAN TOBACCO COMPANY
245 Park Avenue
New York, N. Y. 10017

Dear Ms. Fealey:

Responding to your letter of September 6, this is to inform you that we cannot sign and return the space contract dated March 9, 1973. It is against our policy to sign a contract which affords an advertiser a position of protection in perpetuity. We shall discuss this part of the contract further with Mr. Norman Chester.

Thank you for your correspondence, and please forgive us for our delay in communicating to you about this matter.

Most cordially,



Carl L. Vann
Advertising Director

CLV/sp

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EXHIBIT C--LETTER DATED DECEMBER 3, 1973 ANNEXED
TO AFFIDAVIT OF NORMAN H. CHESTER

PLAYGIRL
THE MAGAZINE FOR WOMEN

December 3, 1973

Mr. Norman Chester
American Tobacco
245 Park Avenue
New York, New York 10017

Dear Norman:

Carrying your Tareyton and Twist full page, four color advertising on the back covers of PLAYGIRL since the maiden issue (June 1973) through the contract year (May 1974) has, is, and will be a happy circumstance for PLAYGIRL. For you and your excellent brands, this has also been a fine association. Not only have you achieved the distinction of being allied with the fastest growing magazine and market available in publishing today, but you have also achieved this at a very advantageous rate. Your costs have been low: \$5,000 per cover from May through November, \$11,800 for December, and only \$13,360 for January through May. You will earn a 10% discount for December; the January-June 1974 covers will earn 15% discount; you've made a terrific buy!

But, effective with June 1974, as I explained to you, PLAYGIRL has elected to diversify its back cover advertisers. Competitive tobacco companies, cosmetic houses, and liquor distillers, among others, will have the opportunity to take advantage of the outstanding PLAYGIRL market through this position; yet American Tobacco will still be able to buy our back covers.

For example: for a 12 page schedule (15% discount), American Tobacco will be able to purchase three back covers, plus second covers, pages preceding the Table of Contents, and other favorable positions.

Norman, we believe that you will agree that the above-mentioned is a more than equitable arrangement, and we are confident of your positive appraisal of the PLAYGIRL market and approval of your continued advertising investment.

Leo J. Dean, PLAYGIRL's Eastern Advertising Manager, will be in touch with you to work out the exact timing and positions.

Sincerely,

William J. Miles
William J. Miles, Jr.
Executive Vice President

WJM:bs

cc: Mr. Leo J. Dean - PLAYGIRL, New York

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EXHIBIT D--LETTER DATED DECEMBER 13, 1973 ANNEXED
TO AFFIDAVIT OF NORMAN H. CHESTER

December 13, 1973

Mr. William J. Miles, Jr.
Playgirl, Inc.
1801 Century Park East
Suite 2300
Century City
Los Angeles, California 90067

Dear Bill:

Thank you for your letter of December 3.

We appreciate your offer, but we will continue to exercise our rights to space in your magazine, established by the present agreement between us dated January 26, 1973.

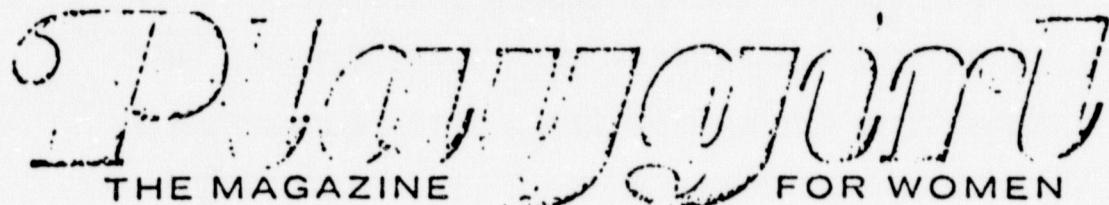
Best regards.

Sincerely yours,

Norman H. Chester
Media Director

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EXHIBIT E--LETTER DATED DECEMBER 20, 1973 ANNEXED
TO AFFIDAVIT OF NORMAN H. CHESTER



December 20, 1973

Mr. Norman Chester
American Tobacco Company
245 Park Avenue
New York, New York 10017

Dear Norman:

You, John Mellett and I talked in your office this past Monday about your 4th cover investment in PLAYGIRL.

Please let me iterate: PLAYGIRL will diversify its 4th cover advertisers effective with the June 1974 issue. Although American Brands will have the option of being on one or more 4th covers for the year beginning with June 1974-May 1975, a 12 or more page commitment by your company will place your brands on positions other than 4th covers for the major portion of the schedule.

I would like very much to meet and talk with you again at your earliest convenience to determine position arrangements.

Sincerely yours,

A handwritten signature in black ink, appearing to read "LJ Dean".

Leo J. Dean
Eastern Advertising Manager

LJD:rs

cc: Messrs. John Mellett--American Tobacco
William J. Miles, Jr.--PLAYGIRL

EXHIBIT F--LETTER DATED JANUARY 11, 1974 ANNEXED
TO AFFIDAVIT OF NORMAN H. CHESTER



CABLE ADDRESS:
POWHATTAN

The American Tobacco Company

A DIVISION OF AMERICAN BRANDS, INC.

245 Park Avenue
New York, N.Y. 10017

January 11, 1974

Registered Mail
Return Receipt Requested

Mr. William J. Miles, Jr.
Executive Vice President
Playgirl, Inc.
Suite 2300
1801 Century Park East
Century City
Los Angeles, California 90067

Dear Bill:

Reference is made to our conversation of January 10, 1974, to your letter of December 3, 1973 to me, to my letter of December 13, 1973 to you, and to Leo J. Dean's letter of December 20, 1973 to me.

This will serve as notice to you that we consider the contract between us dated January 26, 1973, executed by our Mrs. Fealey and by your Mr. Vann, to be valid, binding and enforceable, and that we intend to take every action necessary to enforce such contract to its full extent.

I will expect favorable response by not later than January 18, 1974.

Sincerely yours,

Norman H. Chester
Media Director

EXHIBIT G--LETTER DATED JANUARY 17, 1974 ANNEXED
TO AFFIDAVIT OF NORMAN H. CHESTER

THE MAGAZINE FOR WOMEN

January 17, 1974

Mr. Norman Chester
American Tobacco Company
245 Park Avenue
New York, New York 10017

Dear Norman:

This letter is in response to our last discussion and your letter of last week. I've explained PLAYGIRL's feeling as to perpetuity in a contract. I shall not dwell upon that, but being a person who dislikes problems that requires legal untangling, I would much rather work out a solution to both of our problems that allows PLAYGIRL to keep American Tobacco as a valued client, and would please you at the same time.

I propose that PLAYGIRL give American Tobacco all the available covers for the next twelve months at the page rate that is in effect at this time. Our base rate will soon be 2,000,000 instead of the 1,500,000 at this time. Our projected page rate will be about \$18,000 for the fourth cover. We will also give you today's page rate on inside pages and their cost will be approximately \$13,000 per page at that time. But PLAYGIRL can offer no more than three inside pages for every back cover at today's rate.

I do hope that this plan will meet with your approval. I am looking forward to a favorable reply.

Most sincerely,

William J. Miles Jr.
William J. Miles, Jr.
Executive Vice President
PLAYGIRL MAGAZINE

WJM:dz

cc: Messrs. Leo J. Dean - PLAYGIRL
Fred Klein - Fawcett

EXHIBIT H--LETTER DATED JANUARY 25, 1974 ANNEXED
TO AFFIDAVIT OF NORMAN H. CHESTER

THE MAGAZINE

FOR WOMEN

January 25, 1974

Mr. Norman Chester
American Tobacco
245 Park Avenue
New York, New York 10017

Dear Norman:

PLAYGIRL would like to keep American Tobacco and its brands as advertisers in our pages; and you, of course, would like to have your messages reach our 8 million* readers at the lowest CPM.

May we offer American Tobacco the opportunity--starting with June 1974 and for the 18 months ending with November 1975--to take advantage of an unparalleled offer. This would be for a one page per month situation. For example:

Positions

June 1974-May 1975: 3 back covers, 3 second covers, and 6 favorable inside positions

June 1975-November 1975: 3 second covers, 3 favorable inside positions

Rates

All rates would be predicated on an 18 page/23% discount.

Back covers: 1-time rate: \$13,360; American Tobacco pays \$10,955.20.

Second covers: 1-time rate: \$11,000; American Tobacco pays \$9,020

Inside positions: 1-time page rate: \$10,200; American Tobacco pays \$8,364

And last but not least, Norman, PLAYGIRL will rate protect American Tobacco for the entire term of this contract--the FULL 18 MONTHS, no matter what our circulation or rate may rise to! (It is estimated that PLAYGIRL's circulation by November 1975 will be around the 5 million level.)

Since the June closing is March 18, we would hope to have your favorable reaction to this proposal within the near future.

Please know that I am always at your service in any way and at any time.

Sincerely yours,

Leo J. Dean
Eastern Advertising Manager

*Estimated

LJD:rs

cc: Messrs. William J. Miles, Jr., Ira Ritter--PLAYGIRL, L.A.
PLAYGIRL, INC., 10 EAST 40TH STREET, NEW YORK, NEW YORK 10017 TELEPHONE 212-421-6270

EXHIBIT 2--PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF
MOTION ANNEXED TO MOVING PAPERS

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----- x
:
AMERICAN BRANDS, INC.,
:
Plaintiff,
:
-against- : Index No.
PLAYGIRL, INC., :
Defendant. :
----- x

PLAINTIFF'S MEMORANDUM OF LAW IN
SUPPORT OF PLAINTIFF'S MOTION FOR
A PRELIMINARY INJUNCTION

CHADBOURNE, PARKE, WHITESIDE & WOLFF
Attorneys for Plaintiff
American Brands, Inc.
30 Rockefeller Plaza
New York, New York 10020
(212) 541-5800

Of Counsel:

Paul G. Pennoyer, Jr.
Daniel J. O'Neill
Michael S. Davis

Exhibit 2 Annexed to Moving Papers

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----- x

| | | |
|------------------------|---|-----------|
| AMERICAN BRANDS, INC., | : | |
| Plaintiff, | : | Index No. |
| -against- | : | |
| PLAYGIRL, INC., | : | |
| Defendant. | : | |

----- x

PLAINTIFF'S MEMORANDUM OF LAW
IN SUPPORT OF PLAINTIFF'S MOTION
FOR A PRELIMINARY INJUNCTION

Plaintiff, American Brands, Inc. (hereinafter "American"), respectfully submits this memorandum in support of its motion for a preliminary injunction.

Preliminary Statement

On January 26, 1973, American and defendant, Playgirl, Inc. (hereinafter "Playgirl"), entered into a contract for placement of American's advertising on the back cover of Playgirl Magazine. American manufactures and sells a wide range of consumer products and advertises its products as an important aspect of its marketing program.

Playgirl Magazine is a new entry to the magazine market, having published its first issue in 1973,

dated June 1973. To date Playgirl has only published ten monthly issues. Early in 1973, at a time when Playgirl Magazine was merely a speculative commercial prospect, before any issue had been published, Playgirl approached American seeking backing, in the form of advertising, for its new venture.

American agreed to be one of the ground floor advertisers, buying a twelve-month renewable contract, and thereby providing Playgirl with a reliable source of income at a time when such income was crucial to the success of Playgirl. In return, American required the important and expressly stated proviso that:

"Your acceptance below of this agreement shall also serve to acknowledge our understanding [sic] that we have the continuing and irrevocable right, at our option, to buy the back cover of Playgirl each and every twelve month period, for each issue of Playgirl within that period, for as long a time as Playgirl shall continue to be published."

Defendant has clearly and unequivocably stated its intention to dishonor this contract by refusing to accept plaintiff's advertising for the back cover of its subsequent issues commencing with the June 1974 issue.

Playgirl is a unique advertising medium, reaching a readership which is otherwise not distinctly served. Playgirl has stated that its readers are primarily higher income young women, average age 24, the age when purchasing habits are formed.

Exhibit 2 Annexed to Moving Papers

It is stated in the contract that the "generally accepted practice in magazine advertising" is to grant "the first option of renewal of this space [the back cover] for the corresponding issues of the following years" to whichever advertiser appears in the space during the prior year. This generally accepted practice not only enhances the plaintiff's right to relief but underscores the urgent need for specific relief. Should defendant publish any other advertisement on its back cover, plaintiff's future contractual rights might be jeopardized by the possible renewal claim of that subsequent advertiser.

Plaintiff seeks specific enforcement of a contract which by its very nature can only be performed at the time and in the manner stated in the contract.

This is a Proper Case For a
Preliminary Injunction

Defendant Playgirl has not merely threatened, but stated in the clearest terms that it will not honor its obligations under the contract. The rights which American seeks to enforce include its right to have its advertisement appear in an issue of Playgirl Magazine which will go to press on March 18, 1974 and bear the date June 1974. Any final judgment requiring such publication which issued after March 18 would, therefore, be ineffectual to remedy the injury to the plaintiff.

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CPLR § 6301 provides for the granting of a preliminary injunction as follows:

"Grounds for preliminary injunction and temporary restraining order.

"A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff. A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had."

This case is not unlike the case of Regal Music Co., Inc. v. Hirsch, 15 Misc. 2d 43, 178 N.Y.S.2d 798 (N.Y. Sup. 1958), where the court granted a preliminary injunction to enforce the plaintiff's right to have exclusive placement of a coin operated phonograph in defendant's restaurant. It was noted that there was not only the risk of "a continuing and prejudicial injury to plaintiff's rights with respect to the contract in suit but also the continuing breach of the single contract as a direct impact upon the business of the plaintiff in general." 15 Misc. 2d at 45, 178 N.Y.S.2d at 799-800. Citing Gonzales v. Kentucky Derby Co., Inc., 197 App. Div. 277, 189 N.Y.S. 783 (2d. Dept. 1921), aff'd per curiam, sub. nom. Gonzales v.

Exhibit 2 Annexed to Moving Papers

Reichenthaler, 233 N.Y. 607, 135 N.E. 938 (1922), where a preliminary injunction issued to enforce a plaintiff's right to have its coin operated amusement machine be the only such machine on defendant's premises.

But not only have the New York courts granted preliminary injunctions to enforce exclusive rights, this remedy has also been used to enforce the exercise of an option, holding the option open by preventing the defendant from selling to another while a full determination of plaintiff's rights was pending. Mathieu v. Frankel, 33 App. Div. 2d 551, 304 N.Y.S.2d 439 (1st Dept. 1969).

The Contract is Binding and Enforceable

"It has often been held that when a party to a written contract accepts it as a contract he is bound by the stipulations and conditions expressed in it whether he reads them or not." Metzger v. Aetna Ins. Co., 227 N.Y. 411 at 416, 125 N.E. 814 at 816 (1920); see also Level Export Corp. v. Wolz, Aiken & Co., 305 N.Y. 82 at 97, 111 N.E.2d 218 at 221 (1953). "That contracts providing for perpetual performance are not invalid is undoubtedly the law of New York" Ketcham v. Hall Syndicate Inc., 37 Misc. 2d 693 at 700, 236 N.Y.S.2d 206 at 213 (N.Y. Sup. 1962), aff'd without opinion 19 App. Div. 2d 611, 242 N.Y.S.2d 182, (1963).

Exhibit 2 Annexed to Moving Papers

There can be no question that the agreement is a binding contract supported by consideration and mutual obligations. American has paid more than \$50,000 for the advertising published; American is obligated to pay considerable additional sums for the additional advertising to be published during the remainder of the first publication year; and American shall continue to be obligated to pay for all future advertising space that it purchases under its option at a rate which defendant may set in accordance with the established practices of magazine advertising. This contract certainly establishes a greater obligation on American than the court found necessary in the often cited case of Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 118 N.E. 214 (1917), Cardozo J., where "The defendant gave an exclusive privilege," and consequently "was to have no right for at least a year to place her own indorsements or market her own designs except through the agency of the plaintiff," 222 N.Y. at 91, 118 N.E. at 214 (emphasis in original), and all the plaintiff had given in return was his obligation to exercise best efforts. "The acceptance of the exclusive agency" by Mr. Wood "was an assumption of its duties," 222 N.Y. at 91, 118 N.E. at 214; just as American's exercise of its option will require the payment of advertising fees as established and published by the defendant.

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Indeed, the instant case is not unlike Ketcham v. Hall Syndicate Inc., supra, where the court compared the Wood case saying, "the defendant was expressly obligated to produce certain minimum payments to keep the contract in force, where in the Wood case, supra, the court merely implied an obligation on plaintiff's part to use its best efforts. There is thus certainly more basis for finding mutuality than existed in Wood, where the Court of Appeals found mutuality," 37 Misc. 2d at 698, 236 N.Y.S.2d at 212. Clearly then, the contract in question is a binding mutual obligation supported by consideration.*

Specific Performance is the Proper Remedy

"It has long been the rule that equity is available to place the parties to a contract in the legal position they would have occupied if the repudiated agreement had been performed," Monclova v. Arnett, 3 N.Y.2d 33 at 36, 163 N.Y.S.2d 652 at 654, 143 N.E.2d 375 at 376 (1957). Accordingly, this court should provide the remedy of a preliminary injunction to protect American's right to specific performance of the contract with Playgirl.

* It should also be noted that in any event absence of consideration to support the option would not constitute a defense to American's right to enforce this irrevocable written option. McKinney's General Obligations Law § 5-1109.

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This case is not unlike Goddard v. American Queen, 44 App. Div. 454, 61 N.Y.S. 133 (1st Dept. 1899), reversing 27 Misc. 482, 59 N.Y.S. 46 (N.Y. Sup. 1899), where plaintiffs had contracted for the placement of advertising in defendant's magazine for 18 consecutive months and the defendant had agreed to "refrain from publishing any advertisement for others than the plaintiffs of" competing products. 44 App. Div. at 455, 61 N.Y.S. at 133. The Goddard plaintiffs brought their action seeking specific performance. In Goddard the defendant had already agreed to publish competing advertisements prior to granting the contract to plaintiffs and consequently the defendant refused to publish the plaintiffs' advertisements under the conditions of the contract.

The trial court held that the contract was enforceable but that the only relief it would permit was damages and set a date for a hearing on damages. The plaintiff declined to prove damages and appealed. The appellate division reversed, with a clear holding that specific performance is the proper remedy for failure to publish an advertisement in accordance with a contract.

The appellate division said:

". . . The conclusion of law found by the learned judge contains the adjudication that the plaintiffs have suffered injury which probably cannot be compensated in money damages, a conclusion which is obviously right. Unless it be directed by a court of equity that the contract must be specifically performed, the plaintiffs are

Exhibit 2 Annexed to Moving Papers

remediless. While the right to specific performance by decree of a court of equity rests in judicial discretion, and may be granted or withheld upon a consideration of all the circumstances of a particular case (McCabe v. Matthews, 155 U.S. 550; Heller v. Cohen, 154 N.Y. 306, and cases cited), it is the duty of the court to grant equitable relief where a remedy does not exist at law; where great injury will result to an innocent party unless a court of equity interferes; where the rights of a plaintiff are thoroughly established, and where, as in this case, a sufficient excuse for nonperformance has not been proven. Under such circumstances, judicial discretion to grant relief becomes judicial duty to grant it. . . ." 44 App. Div. at 459, 61 N.Y.S. at 136.

Noting the grounds upon which the trial court had denied specific performance the appellate division continued:

". . . One ground upon which specific performance was refused in this case is a supposed difficulty the court would encounter in compelling the American Queen to perform its contract and in the enforcement of the negative provision. That such provisions in a contract will be specifically enforced was settled by what was held in Standard Fashion Co. v. Siegel-Cooper Co. (30 App. Civ. 60 affd., 157 N.Y. 60). As was said by this court in that case, the general rule is, not to decree specific performance of contracts which by their terms stipulate for a succession of acts whose performance cannot be consummated by one transaction, but will be continuous, and require protracted supervision and direction. But in the case at bar there is no such necessity; the simple obligation rested upon the American Queen to refrain from publishing any advertisement for any other party than the plaintiffs, of a particular kind of article so plainly described in the contract with the plaintiffs that a simple inspection of any advertisement offered by a rival of the plaintiffs would enable the defendant to determine immediately whether or not it was of goods of the same character as those advertised by the plaintiffs. . . ." 44 App. Div. at 459-460, 61 N.Y.S. at 136-137.

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The court noted that a monthly magazine is not a difficult defendant to supervise:

". . . The American Queen Magazine was issued once a month; an advertisement of a rival of the plaintiffs would be inserted but once a month; any violation of a decree of the court would be a single act, that could only occur once a month; and upon process for contempt for disobedience of a decree the court could very readily determine whether a particular advertisement violated that decree or not. We think, therefore, that the complaint was improperly dismissed upon that ground." 44 App. Div. at 460, 61 N.Y.S. at 137.

Not only is a monthly magazine not difficult for a court to supervise, but the matter in controversy in the instant case is less demanding on the court than the question in Goddard. The only question for the court to consider in enforcing this contract would be whether or not Playgirl has published the advertising submitted by American on its back cover; there would be no close questions of what is and is not a competing product, only a straight forward determination of whether or not American's advertisement was accepted and published.

CONCLUSION

The Court should issue a preliminary injunction ordering defendant to accept plaintiff's advertising for the cover of Playgirl Magazine in order to prevent

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irreparable harm to plaintiff during the pendency of this action.

Respectfully submitted,

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(212) 541-5800

Of Counsel:

Paul G. Pennoyer, Jr.
Daniel J. O'Neill
Michael S. Davis

EXHIBIT 3--DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION
TO MOTION ANNEXED TO MOVING PAPERS

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----x
AMERICAN BRANDS, INC., :
Plaintiff, : Index No. 2396/74
- vs - :
PLAYGIRL, INC., :
Defendant. :

DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO
PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

KIRSCHSTEIN, KIRSCHSTEIN,
OTTINGER & FRANK, P.C.
Attorneys for Defendant
60 East 42nd Street
New York, New York 10017
(212) 687-1098

Exhibit 3 Annexed to Moving Papers

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
AMERICAN BRANDS, INC., :
Plaintiff, : Index No. 2396/74
-against- :
PLAYGIRL, INC., :
Defendant. :
-----X

DEFENDANT'S MEMORANDUM OF LAW
IN OPPOSITION TO PLAINTIFF'S MOTION
FOR A PRELIMINARY INJUNCTION

Defendant, Playgirl, Inc. (hereinafter "Playgirl") submits this Memorandum in Opposition To The Motion For a Preliminary Injunction made by American Brands, Inc.

Introduction

The so-called Agreement dated January 26, 1973, on which the plaintiff's Complaint in this action is based, is void for lacking mutuality of obligation. Such Agreement, prepared by plaintiff, is wholly without consideration due to plaintiff reserving to itself an unconditioned and absolute "cancellation privilege" as to the use of the space covered by the Agreement.

In demanding its rights before this Court, plaintiff has, however, conveniently failed to in any way mention its absolute right to cancel. What an empty exercise it would be for this

Exhibit 3 Annexed to Moving Papers

Court to grant the Plaintiff its request only to have plaintiff then cancel the advertising space.

Further, the clause which plaintiff requests the Court to specifically enforce, explicitly involves no promise or agreement, whatsoever, to perform any act on the part of the defendant, Playgirl. It only describes an acknowledged understanding of American Tobacco Company. At best, plaintiff may be interpreted as having obtained an option without value to buy back covers of Playgirl, which option was revoked prior to being exercised.

Plaintiff by its Complaint and by this motion is asking this Court to perform a futile act. The motion of plaintiff should be denied.

Background of the Agreement

The defendant commenced to publish Playgirl Magazine in 1973. The maiden issue was dated June 1973 and was first sold in May. 600,000 copies were printed. The second and third issues were respectively printed in quantities of 700,000 and 1,000,000 copies.

Advertising was desired for the magazine and a contract with Carl Vann Company was entered into for the purpose of having orders for advertising solicited. Carl Vann Company was at all times an independent contractor.

American Tobacco Company was among the several advertisers who were contacted by Carl Vann, the principal of said Carl Vann Company. Negotiations were conducted with Norman Chester of

Exhibit 3 Annexed to Moving Papers

said American Tobacco Company, who at the outset demanded that American Tobacco Company be granted a perpetual right to have its advertising appear on the back cover of Playgirl Magazine. Such demand was refused and never mentioned again.

In signing the letter Agreement dated January 26, 1973, Carl Vann did not notice the one paragraph appearing on the reverse face of the letter which plaintiff now seeks to enforce. Certainly no such provision could have been expected as no perpetual rights were agreed to or discussed beyond the initial mention and rebuke of such desires of American Tobacco Company.

In short, the Agreement dated January 26, 1973, served to reserve seven back covers of Playgirl Magazine for advertising of American Tobacco Company at a cost of \$5,000.00 per back cover. A free page of advertising inside the magazine was also given to American Tobacco Company under the Agreement. American Tobacco Company reserved the absolute unconditioned right to cancel the advertising space covered by the Agreement, which states:

"We reserve a cancellation privilege as to the use of this space."

Playgirl, Inc. first became aware of the single paragraph on the back of the letter Agreement sometime in the fall of 1973 when Carl Vann first provided a copy of the Agreement to defendant Playgirl. The defendant instructed Carl Vann to advise American Tobacco Company that no perpetual rights would be accepted or agreed to by Playgirl. This was accomplished by a letter dated September 25, 1973, from Carl Vann to T. B. Fealey (please see .

Exhibit 3 Annexed to Moving Papers

Chester Affidavit, Exhibit B). American Tobacco Company was again notified of the same by a letter dated December 3, 1973, from William J. Miles, Jr. to Norman Chester (please see Chester Affidavit, Exhibit C) and again by a letter dated December 20, 1973, from Lee J. Dean to Norman Chester (please see Chester Affidavit, Exhibit E).

It is not clear that even T. B. Fealey, of American Tobacco Company and the author of said Agreement, knew of the presence of said single paragraph on the back of her letter. Certainly she must have believed that John Weller, who also represented Playgirl and was present with Carl Vann when the Agreement was signed, did not earlier know of the paragraph allegedly granting perpetual rights to American Tobacco Company; otherwise, why did she call special attention to said paragraph by writing, "note last paragraph of contract", in a letter dated July 17, 1973 to John Weller requesting that a duplicate agreement newly dated March 9, 1973 be signed. A copy of such letter and the duplicate Agreement referred to therein is annexed hereto as Exhibit 1.

A Court Should Not Order Specific Performance Of A Void Agreement

"Of course, a court will not decree the specific performance of a contract unless there is a valid contract to be enforced." Corbin on Contracts, Section 1140.

"Specific performance will generally not be decreed with respect to a contract that is wholly without consideration and

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in reliance upon which no substantial change of position has occurred, even though it is under seal or is otherwise legally binding by reason of its form." Corbin on Contracts, Section 1165.

The Subject Agreement is Void For Wholly Lacking Consideration

The subject Agreement reserves to plaintiff the absolute right to cancel. The Agreement states,

"We reserve a cancellation privilege as to the use of this space"

The absolute right of plaintiff to cancel makes the subject case a classic. It is long established that any promise reserving an absolute right of cancellation in the promisor in reality promises nothing at all and so is insufficient consideration.

The Case of Miami Coca Cola Bottling Company vs. Orange Crush Company (5th CIR., 1924) 296 F. 693 involved facts that closely parallel this case. The contract there involved was in the form of a license, the Appellee, Orange Crush Company, granting to the Appellant, Miami Coca Cola Bottling Company, the exclusive right within a certain territory to manufacture, bottle and distribute a drink called "Orange Crush" under Appellee's trademark. The Orange Crush Company agreed, among other things, to supply concentrate to be used for producing the drink. Miami Coca Cola agreed to purchase certain quantities of the concentrate. The license granted was perpetual but contained a proviso to the effect that Miami Coca Cola might at any time cancel the contract. The parties operated under the contract for about a year, after

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which Orange Crush notified Miami Coca Cola that it would no longer be bound. The Court stated,

". . . the contract was void for lack of mutuality . . . So far . . . as the contract remains executory, it is not binding, since it can be terminated at the will of one of the parties to it. The consideration was a promise for a promise. But the Appellant did not promise to do anything, and could at any time cancel the contract. According to the great weight of authority such a contract is unenforceable. Marble Co. v. Ripley, 10 Wall. 339, 359, 19 L. Ed. 955; Willard Sutherland & Co. v. United States, 262 U. S. 489, 43 Sup. Ct. 592, 67 L. Ed. 1086; Velie Motor Car Co. v. Kopmeier Motor Car Co., 194 Fed. 324, 114 C. C. A. 28-; McCaffrey v. Knight (D. C.) 282 Fed. 334; Fowler Utilities Co. v. Gray, 168 Ind. 1, 79 N. E. 897, 7 L. R. A. (N. S.) 726, 120 Am. St. Rep. 344; 6 R. C. L. 691; 1 Williston, pp. 219, 222. The contract cannot be upheld upon the theory that the appellant had a continuing option, because an option to be valid must be supported by a consideration. 6 R. C. L. 687." (296 F. at pg. 694)

The Restatement of Contracts, Section 79 states,

"A promise or apparent promise which reserves by its terms to the promisor the privilege of alternate courses of conduct is insufficient consideration if any of these courses of conduct would be insufficient consideration if it alone were bargained for."

Such section of the Restatement of Contracts is accompanied by the following illustration:

"A promises B to act as B's agent for three years on certain terms, and B agrees that A may so act, but reserves the power to cancel the agreement at any time. B's agreement is insufficient consideration, since it involves nothing that can properly be called a promise."

Clearly, the subject agreement is void.

No Perpetual Option Or Right For
Back Covers Is Granted To Plaintiff

The single paragraph on the back of the letter Agreement that is relied on by plaintiff in its claim to a perpetual right to the back cover of Playgirl Magazine, when carefully read, literally amounts to no more than a statement of "understanding" of plaintiff; but no grant or agreement by defendant. It is literally impossible to interpret such paragraph as conveying a perpetual right of any kind to plaintiff. The paragraph states as follows:

"*Your acceptance below of this agreement shall also serve to acknowledge our understanding that we have the continuing and irrevocable right, at our option, to buy the back cover of Playgirl each and every twelve month period, for each issue of Playgirl within that period, for as long a time as Playgirl shall continue to be published."

(underlining added).

It is perfectly clear that the pronouns "our" and "we" must be consistent references to the American Tobacco Company, a division of plaintiff. In short then, the paragraph which is so neatly typed on the back of the letter agreement prepared by plaintiff does no more than state that "acceptance" of the Agreement serves to "acknowledge" the "understanding" of American Tobacco Company with respect to its having a continuing and irrevocable right, at its option, to buy the back cover of Playirl Magazine for the life of the magazine. No promise whatsoever is made by or on behalf of the defendant, Playgirl, conveying any such continuing and irrevocable right to buy the back cover of Playgirl for life. Perhaps, American Tobacco

Exhibit 3 Annexed to Moving Papers

Company had believed or hoped that it had obtained such rights on some other occasion; but certainly not by the paragraph on which it now seeks to rely.

Any Option Created was Revoked
Prior to Acceptance

Even assuming arguendo that the paragraph relied on by plaintiff created an option by which plaintiff could buy additional back covers of Playgirl Magazine, the notifications by the aforementioned letter dated September 25, 1973, addressed to T. B. Fealey from Carl L. Vann (please see Chester Affidavit, Exhibit B) advising, "It is against our policy to sign a contract which affords an advertiser a position of protection in perpetuity" revoked such option. Similarly, the letter dated December 3, 1973, to Norman Chester from William J. Miles, Jr. (please see Chester Affidavit, Exhibit C) would serve to repudiate and revoke any such option that may have been created by advising, "Playgirl has elected to diversify its back cover advertisers". The same result is produced by the letter dated December 20, 1973, to Norman Chester from Leo J. Dean (please see Chester Affidavit, Exhibit E). Clearly, such was the interpretation of Norman H. Chester as revealed by his Affidavit submitted by plaintiff in this action (please see Chester Affidavit, paragraphs 16, 17, 18 and 19).

*Exhibit 3 Annexed to Moving Papers*Exceedingly Great Hardships Would Result
From An Order Requiring Defendant
To Print Plaintiff's Advertisements

Defendant has sought to accommodate the reasonable advertising desires of the plaintiff. Since as early as December 1973 defendant Playgirl has tried to meet the needs of plaintiff. But plaintiff has steadfastly refused to deal.

Plaintiff now cites a so-called "general practice" of first option of renewal to show "an urgent need for specific relief". There is no such general practice or custom that binds or obligates a publisher to extend an opportunity of first refusal to past advertisers. Nevertheless defendant has continually extended opportunities for advertising space to plaintiff, all of which plaintiff has refused.

Plaintiff's adamancy has left defendant no choice but to seek other advertisers for the back covers of Playgirl Magazine and as of this date the back covers of all issues for the calendar year 1974 have been committed to other advertisers. Such commitment to other advertisers has been necessitated by the requirement that a magazine's contents be finalized three months in advance of the on-sale date for each issue and by the extensive advance planning that is required to develop and maintain for a magazine a cohesive editorial content including advertising.

To now require defendant to print plaintiff's cigarette ads, exclusively, on the back cover of Playgirl Magazine, pending this litigation or thereafter, would result in other advertisers

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Exhibit 3 Annexed to Moving Papers

to whom such back covers have already been committed being injured. Also, the defendant would be subjected to exceedingly great hardships as a result of the disruption of its business relationships with such other advertisers and the potential rupture of existing commitments of defendant Playgirl.

Plaintiff seeks specific performance which would be oppressive, inequitable and unconscionable particularly in view of the subject contract being indisputably void on its face for lack of consideration.

Plaintiff Can Nullify The Court's Order By Exercising Its Right to Cancel

Should specific performance be ordered by this Court, it is clear that the plaintiff can at any time thereafter exercise its right of cancellation and thereby nullify this Court's order. The work of the Court can thus be, without adieu, rendered useless by the plaintiff.

Again referring to the aforementioned case of Miami Coca Cola Bottling Company vs. Orange Crush Company, *supra*, the Court stated,

"In *Express Co. v. Railroad Co.*, 99 U.S. 191, it is said, at page 200 (25 L. Ed. 319): 'A court of equity never interferes where the power of revocation exists.' The reason given is that it is within the power of one of the parties to render the action of the court a nullity." (296 F. at page 694).

Original

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Exhibit 3 Annexed to Moving Papers

effectively specifically enforces a void contract should be denied.

Respectfully submitted,

Peter T. Cobrin
Kirschstein, Kirschstein,
Ottinger & Frank, P. C.
Attorney for Defendant
60 East 42nd Street
New York, New York 10017

Of Counsel:

Eric T. S. Chung
California Federal Plaza
5670 Wilshire Boulevard, Suite 1840
Los Angeles, California 90036

EXHIBIT 1--LETTER DATED JULY 17, 1973 AND DUPLICATE
AGREEMENT ANNEXED TO DEFENDANT'S MEMORAN-
DUM OF LAW IN OPPOSITION TO MOTION



The American Tobacco Company
A DIVISION OF AMERICAN BRANDS, INC.
245 Park Avenue
New York, N.Y. 10017

July 17, 1973

Mr. John Weller
Playgirl, Inc.
4055 Wilshire Boulevard
Suite 420
Los Angeles, California 90010

Dear Mr. Weller:

In order that our records be complete we ask that the duplicate copy (note last paragraph of contract) of our space contract dated March 9, be returned to us with signed acceptance on the reverse side.

Thank you.

Very truly yours,

T.B. Fealey
T. B. Fealey
Corporate Media Department

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Exhibit 3 Annexed to Moving Papers

N.Y.O. 127.111-701



PLAYGIRL, INC.
4055 WILSHIRE BOULEVARD
SUITE 420
LOS ANGELES, CALIFORNIA 90010
Gentlemen:

THIS CONTRACT
REVISES CONTRACT
DATED 1/26/73

DUPLICATE COPY

The American Tobacco Company

A DIVISION OF AMERICAN BRANDS, INC.

245 Park Avenue
New York, N.Y. 10017

MARCH 9, 1973

JOHN WELLER
MARTIN & HART
131 SO. 31ST STREET
KENILWORTH, NEW JERSEY 07033.

We hereby reserve for advertising the products of The American Tobacco Company Division and its related companies, space as follows, in PLAYGIRL

| Brand | Space | Date | Position | Rate |
|-------|-------|------|----------|------|
| | | | | |

SEE SUPPLEMENT SHEET ATTACHED

Rate is based on: 600,000 PLUS CIRCULATION

The acceptance of this advertising is upon the definite and express agreement that, as to advertising herein provided for, as well as all other advertising of our products, you recognize the advertising agency placing it as an independent contractor; and you agree to look to the advertising agency for payment and hold harmless The American Tobacco Company Division and its related companies. We are, of course, bound to pay the agency. This is in accordance with the custom in the advertising business and such custom is, we understand, general and generally recognized, and recognized by you; but this agreement by you to hold us harmless is binding whether that is so or not; and is made as part of the consideration for placing this advertising.

In view of the foregoing, you are at liberty to cancel this agreement before any advertising is run if the agency placing it is not acceptable to you, without incurring any damages for cancellation.

It is understood and agreed that the rate for space used is the minimum rate at which a contract for a similar (equal or less) amount of space, for national display advertising to be published in a like position, can be secured; and that if at any time during the life of this contract you make a lower rate for such advertising, then this contract is to be completed at such lower rate from date reduced rate becomes effective.

In keeping with the generally accepted practice in magazine advertising, it is understood that The American Tobacco Company Division and its related companies are to have the first option of renewal of this space for the corresponding issues of the following year. *See Reverse Side.

We reserve a cancellation privilege as to the use of this space WE HAVE THE RIGHT TO CANCEL THE SUBSEQUENT ISSUES WITHOUT PENALTY IF THE PREMIERE ISSUE IS UNSATISFACTORY TO US.

KINDLY ACKNOWLEDGE ACCEPTANCE on the reverse side of the duplicate copy of contract and return to this office.

Very truly yours,

T. B. Fealey

THE AMERICAN BRANDS COMPANY T. B. FEALEY
CORPORATE MEDIA DEPARTMENT
The American Tobacco Company
A Division of American Brands, Inc.

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Exhibit 3 Annexed to Moving Papers

*YOUR ACCEPTANCE BELOW OF THIS AGREEMENT SHALL ALSO SERVE TO ACKNOWLEDGE OUR UNDERSTANDING THAT WE HAVE THE CONTINUING AND IRREVOCABLE RIGHT, AT OUR OPTION, TO BUY THE BACK COVER OF PLAYGIRL EACH AND EVERY TWELVE MONTH PERIOD, FOR EACH ISSUE OF PLAYGIRL WITHIN THAT PERIOD, FOR AS LONG A TIME AS PLAYGIRL SHALL CONTINUE TO BE PUBLISHED.

ACCEPTED: PLAYGIRL, INC.

RECEIVED BY: _____

TITLE: _____

Exhibit 3 Annexed to Moving Papers

PLAYGIRL

MARCH 9, 1973

| <u>BRAND</u> | <u>SPACE</u> | <u>1973 DATES</u> | <u>POSITION</u> | <u>RATE</u> |
|----------------------------|--------------|--|-----------------|-------------------------------------|
| TALL MALL FILTER TIPPEE | PAGE 4-COLOR | JUNE | FRONT OF BOOK | NO CHARGE |
| TAREYTON | | JUNE, JULY, AUG., SEPT., OCT., NOV., DEC. | BACK COVER | \$4,500.00 REFLECTS 10% DISCOUNT |

ADDITIONAL ADVERTISING IN B&W OR COLOR IS USED
ATE IS TO BE RATE EFF. JAN. 1973 FOR AS LONG A
ERIOD AS RATE IS IN EFFECT ON ANY OTHER ADVERTISING
ACCOUNT.

IMPORTANT
COUPON ADVERTISING IS TO APPEAR ON THE
VERSE SIDE OF OUR ADVERTISING.
INSERT CARD IS TO BE PLACED ON THE SAME
PREAD WITH ONE OF OUR ADS.
CIGARETTE BRANDS OF OUR MANUFACTURE SHOULD
E SEPARATED BY AT LEAST TWELVE (12) PAGES.

SEPARATE BY AT LEAST SIX (6) PAGES FROM ANY CIGARETTE
ADVERTISING OR ANY ADVERTISING WHICH IS INCOMPATIBLE
TO ANY OF OUR CIGARETTE ADVERTISING OR WHICH REFLECTS
ADVERSELY UPON CIGARETTES.

ALL ADVERTISING TO BE POSITIONED AS SPECIFIED. IF UNABLE
TO POSITION AS SHOWN YOU AGREE TO ADVISE THE APPROPRIATE
ADVERTISING AGENCY PRIOR TO CANCELLATION DATES SPECIFIED
HEREIN. BATTEN, BARTON, D' TINE & OSBORN, INC., SHOULD
BE NOTIFIED FOR TAREYTON.

AGENCY COMM. 1/2
CASH DISC. 2%

ONLY COPY AVAILABLE

EXHIBIT 4--AFFIDAVIT OF IRA RITTER ANNEXED
TO MOVING PAPERSSUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
AMERICAN BRANDS, INC., :
Plaintiff, :
- against - :
PLAYGIRL, INC., :
Defendant. :
-----X

RECEIVED 2/17/74
*M. Elliott*AFFIDAVIT OF
IRA RITTER

Index No. 2396/74

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

IRA RITTER, being duly sworn, deposes and says:

1. I am Assistant Vice President in charge of advertising at Playgirl, Inc. the defendant in this action.
2. I am familiar with facts and circumstances pertinent to this matter as set out hereinbelow.
3. Under a letter agreement dated January 26, 1973, submitted by American Tobacco Company, a division of the plaintiff American Brands, Inc. and signed by Carl Vann, at the time an independent contractor soliciting orders for advertising in Playgirl Magazine, cigarette advertisements appeared on the back cover of Playgirl Magazines for the seven months of June 1973 through December 1973.
4. Cigarette advertisements of American Tobacco Company were printed on the back cover of Playgirl Magazine for the months of January, February and March 1974 and are to be printed on the back covers for April and May 1974.

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Exhibit 4 Annexed to Moving Papers
Affidavit of Ira Ritter

American Tobacco Company was advised as early as September 1973 that Playgirl would not honor any obligation to print American Tobacco Company advertisements in perpetuity via a letter dated September 25, 1973, to T. B. Fealey from Carl L. Vann as advertising director, his acquired position at Playgirl, Inc. at that time. Said letter is attached to the Affidavit of Norman Chester as Exhibit B thereof.

6. Numerous attempts have since been made by Playgirl, Inc. to accommodate the reasonable advertising desires of American Tobacco Company. All such attempts to reach an accommodation have been refused by American Tobacco Company.

7. The back cover of a magazine is a coveted location for advertising due to its exposure. Customarily, advertisers purchase as a package several pages of advertising on the inside of a magazine for each back cover, as it is available, since normal demand for the back cover is high.

8. American Tobacco Company has steadfastly refused to purchase any such package even when offered by Playgirl, Inc. at very favorable rates.

9. The contents of each Playgirl Magazine must be finalized approximately three months in advance of the scheduled date of sale to allow for printing, binding, shipment and distribution to retail outlets. Planning the contents of a magazine requires months of advance planning to have a cohesive editorial content which includes advertising. The adamant refusal of American Tobacco Company to purchase any advertising offered by Playgirl, Inc. has forced Playgirl, Inc. to seek other advertisers for its

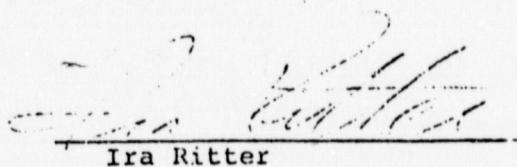
Exhibit 4 Annexed to Moving Papers
Affidavit of Ira Ritter

pages and covers or be faced with the inability to finalize the magazine contents in time for printing and distribution.

10. Accordingly, Playgirl, Inc. has at this time already committed to other advertisers the back cover of Playgirl Magazine for each issue in the calendar year 1974. Playgirl, Inc. is not bound by custom or practice to make available future back covers of Playgirl Magazine to the same advertisers.

11. I know of no custom in the magazine industry that obligates or binds a publisher to extend an opportunity of first refusal to a past advertiser. Such opportunities of first refusal are simply a courtesy extended by a publisher to its advertising customers. Playgirl, Inc. has extended several opportunities for advertising space to American Tobacco Company, none of which were accepted.

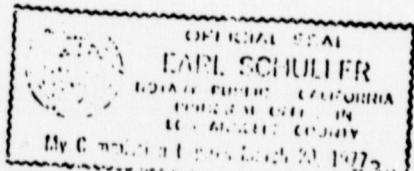
12. To require Playgirl, Inc. to print cigarette advertisements of American Tobacco Company after its refusals to reserve such advertising as offered by Playgirl, Inc. would now be unfair and would cause exceedingly great hardships and damage to Playgirl, Inc. as well as its other advertisers.


Ira Ritter

STATE OF California)
 COUNTY OF Los Angeles) ss

Sworn to and subscribed before me this 16 day of Feb.,

1974.



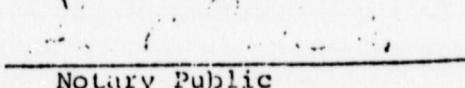

Notary Public

EXHIBIT 5--AFFIDAVIT OF CARL VANN ANNEXED TO MOVING PAPERS

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X-----
AMERICAN BRANDS, INC., :
Plaintiff, : AFFIDAVIT OF CARL VANN
-against - : Index No. 2396/74
PLAYGIRL, INC., :
Defendant. :
-----X-----

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

CARL VANN, being duly sworn, deposes and says:

1. On December 15, 1972, I entered into a contract with Playgirl, Inc. Under such contract I was to perform the services of soliciting orders for advertising in Playgirl Magazine throughout the United States. The terms of said contract explicitly stated that I would "enjoy the status of an independent contractor and CV (Carl Vann) is not an employee of PG (Playgirl, Inc.)" (parenthesis added).

2. The aforesaid contract expressly stated, "all orders for advertising were subject to acceptance by PG (Playgirl, Inc.) and may be rejected by PG (Playgirl, Inc.) if unacceptable from the standpoint of quality or credit" (parenthesis added).

3. In the performance of services for Playgirl, Inc. under said contract, I negotiated with Norman Chester who I understood to represent the American Tobacco Company for the purpose of selling advertising space to the American Tobacco Company. My

*Exhibit 5 Annexed to Moving Papers
Affidavit of Carl Vann*

discussions with Norman Chester resulted in placing my signature on the back of a letter dated January 26, 1973, from T. B. Pealey to Playgirl, Inc., 4055 Wilshire Boulevard, Suite 420, Los Angeles, California 90010 and to John Weller, Martin & Hart, 131 South 31st Street, Kennilworth, New Jersey 07033, which letter is attached as Exhibit A accompanying the affidavit of Norman H. Chester, which affidavit has been filed in this Court on behalf of the plaintiff, American Brands, Inc. The aforementioned John Weller was present at the time I subscribed my name, as above mentioned.

4. The negotiations with Norman Chester, as above mentioned, included at the outset a proposal by the American Tobacco Company that it have the right to buy the back cover of Playgirl Magazine forever. Such proposal of the American Tobacco Company was refused immediately and not discussed again.

5. At the time I signed the aforementioned document dated January 26, 1973, (Chester Affidavit, Exhibit A) I was totally unaware of any writing thereon that even suggested or referred to the American Tobacco Company having any right to buy/for advertising purposes the back cover of Playgirl Magazine. I would not have signed my name to said document dated January 26, 1973, had I known, seen or otherwise been aware of words to that effect.

6. The aforementioned document dated January 26, 1973, (Chester Affidavit, Exhibit A) was fully prepared by the American Tobacco Company.

7. I was not authorized directly or indirectly to commit, bind or otherwise obligate in any way Playgirl, Inc. on any contract

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Exhibit 5 Annexed to Moving Papers
Affidavit of Carl Vann

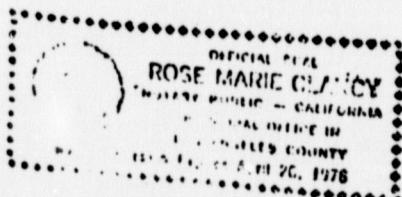
or to any obligation whatsoever under the terms of my contract
aforementioned.

3. A copy of said document dated January 26, 1973, (Chester
Affidavit, Exhibit A) was not delivered to Playgirl, Inc. until
sometime in the fall of 1973. Playgirl, Inc., however, was prior
to that time advised that American Tobacco Company had purchased
the back cover of Playgirl Magazine for the purpose of placing
advertising thereon for a 7 month period commencing with the
first issue of the Playgirl Magazine. Upon my providing a copy of
said document dated January 26, 1973, I was immediately instructed
by Playgirl, Inc. that any obligation contained therein requiring
Playgirl, Inc. to sell the back cover of Playgirl Magazine to the
American Tobacco Company for its advertising forever was not
acceptable and not approved by Playgirl, Inc. After receiving
such instructions from Playgirl, Inc., I advised the American
Tobacco Company that any obligation or "contract which affords
an advertiser a position of production in perpetuity" was unacceptable
by letter dated September 25, 1973, to T. B. Fealey (Chester
Affidavit, Exhibit B).

X Carl Vann
Carl Vann

STATE OF California)
CITY OF Los Angeles) ss

Swear to and subscribed before me this 15 day of February,
1974.



Notary Public

EXHIBIT 6--PETITION FOR REMOVAL ANNEXED TO
MOVING PAPERSIN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW YORK

-----x

American Brands Inc :
Petitioner-Defendant, :
-against- :
Playgirl Inc. : Civil Action No.
AMERICAN BRANDS, INC., :
: 74C948
Respondent Plaintiff, : C LB
:-----x
PETITION FOR REMOVAL OF CIVIL ACTION
NO. 2396/74 TO UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF
NEW YORK

-----x

Comes now the petitioner-defendant, Playgirl, Inc., in the above-entitled action pursuant to Sections 1441 and 1446 of Title 28 of the United States Code (28 U.S.C. Sections 1441, 1446) and for its petition for removal states as follows:

1. Action Index No. 2396/74 was initiated in the Supreme Court of the State of New York, County of New York, by plaintiff, American Brands, Inc., against defendant, Playgirl, Inc., by the filing of a Complaint dated February 12, 1974, a copy of said Complaint with accompanying Summons issued therewith being attached hereto as Exhibit 1 hereof. Pursuant to an Order to Show Cause dated February 14, 1974, a copy of which is attached hereto as Exhibit 2, plaintiff, American Brands, Inc., brought on a motion for a preliminary injunction and defendant, Playgirl, Inc. appeared on February 19, 1974 before Justice Korn at a Special Term, Part I, of the Supreme Court of New York, County of New York. A copy of PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION is attached hereto as Exhibit 3. Copies of DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION and an AFFIDAVIT OF IRA RITTER and an AFFIDAVIT OF CARL VANCE are attached hereto as Exhibit 4, 5 and 6, respectively. Justice Korn at a settlement hearing, in chambers on February 20, 1974, permitted the defendant, playgirl, Inc., the opportunity to file a supplemented memorandum of law and withheld any decision on the motion of plaintiff, American Brands, Inc. no further proceedings were taken on the motion.

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Exhibit 6 Annexed to Moving Papers

2. Said Action Index No. 2396/74 is a Civil Action for declaratory judgment on a contract and enforcement of said contract of which this Court has original jurisdiction under Section 1332 of Title 28 of the United States Code (28 U.S.C. Section 1332) and which can be removed pursuant to Section 1441 of Title 28 of the United States Code (28 U.S.C. Section 1441).

3. Upon information and belief, plaintiff, American Brands, Inc., is a corporation duly organized and existing under the laws of the State of New Jersey and maintains a principal office at 245 Park Avenue, in the City, County and State of New York. Defendant, Playgirl, Inc., is a corporation organized and existing under the laws of the State of California and has its principal place of business at 1801 Century Park East, Suite 2300, Century City, California. The matter in controversy in said aforesaid mentioned Action Index No. 2396/74 exceeds the sum or value of Ten Thousand (\$10,000.00) Dollars exclusive of interest and costs.

4. Petitioner files and presents herewith a bond, with good and sufficient surety in the penal sum of Five Hundred (\$500.00) Dollars, conditioned, as required by Section 1446(d) of Title 28 of the United States Code (28 U.S.C. Section 1446(d)) that it will pay all costs and disbursements incurred herein by reason of the removal proceedings hereby brought should it be determined that said Action Index No. 2396/74 is not removable or is improperly removed.

WHEREFORE, Petitioner prays that said Action Index No. 2396/74 be removed from the Supreme Court of the State of New York, County of New York, to the United States District Court for the Southern District of New York.

2/27/74



Peter T. Cobrin
Kirschstein, Kirschstein,
Oettinger & Frank, P.C.
Attorneys for Defendant
60 East 42nd Street, Suite 850
New York, New York 10017

OF COUNSEL:

Eric T. S. Chung
California Federal Plaza
5670 Wilshire Boulevard, Suite 1840
Los Angeles, California 90036

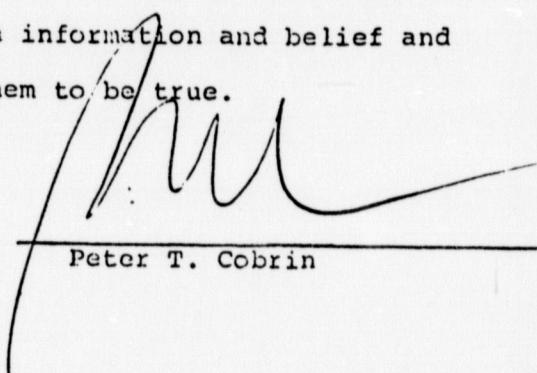
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Exhibit 6 Annexed to Moving Papers

VERIFICATION

I am an attorney associated with the firm of Kirschstein, Kirschstein, Oettinger & Frank, P.C., 60 East 42nd Street, Suite 850, New York, New York 10017, attorneys for defendant, Playgirl, Inc., in the above-entitled matter. I have read the foregoing PETITION FOR REMOVAL OF CIVIL ACTION NO. 2396/74 TO UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK and the same is true of my own knowledge except as to the matters stated therein on information and belief and as to those matters I believe them to be true.

2/21/74


Peter T. Cobrin

PROPOSED ORDER OF INJUNCTION ANNEXED TO MOVING PAPERS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN BRANDS, INC., :
Plaintiff, :
-against- : ORDER
PLAYGIRL, INC., : 74 Civ. 948
Defendant. : (CLB)

The plaintiff having moved, by Order to Show Cause, dated March 4, 1974, for an order granting a preliminary injunction pending the final determination in the above entitled action and the motion having come on for a hearing on March , 1974, and

Upon reading and filing the Order to Show Cause signed by Mr. Justice Starke of the Supreme Court of New York, on the 13th day of February, 1974, and upon hearing the argument of counsel and being fully advised, it is

O R D E R E D, that until the determination of the motion brought on by said order to show cause dated March 4, 1974, and the entry of an order thereon, the defendant, Playgirl, Inc., be and it is hereby stayed, enjoined and restrained from

- (1) Refusing to publish plaintiff's advertising on the back cover of its magazine, PLAYGIRL, in the issue of said magazine to be dated June 1974 and each of the

SAMPLE

Proposed Order of Injunction Annexed to Moving Papers

next eleven monthly issues, and thereafter in accordance with the contract between plaintiff and defendant dated January 26, 1973;

(2) Accepting, or incurring any contractual obligation to accept, advertising for publication on the back cover of its magazine, PLAYGIRL, for the issue to be dated June 1974 and any subsequent issue.

Dated: March , 1974

U.S.D.J.

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SUMMONS

Supreme Court of the State of New York
County of NEW YORK

AMERICAN BRANDS, INC.,

against

PLAYGIRL, INC.,

COPYRIGHT 1964 BY JULIUS BLUMBERG, INC., LAW BLANK PUBLISHERS
80 EXCHANGE PLACE AT BROADWAY, NEW YORK

Index No. 72-116174

Plaintiff designates

New York

County as the place of trial

The basis of the venue is
Transaction occurred in
the County of New York

Summons

Plaintiff resides at 245 Park Ave.
New York, N.Y.

Defendant

County of New York

To the above named Defendant

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney(s) within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated, February , 1974

CHADBOURNE, PARKE, WHITESIDE & WOLFF
Attorney(s) for Plaintiff

Office and Post Office Address
30 Rockefeller Plaza
New York, N. Y. 10020

212-541-5800

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COMPLAINT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

- - - - - x

| | | |
|------------------------|---|------------------|
| AMERICAN BRANDS, INC., | : | |
| Plaintiff, | : | VERIFIED |
| -against- | : | <u>COMPLAINT</u> |
| PLAYGIRL, INC., | : | Index No. |
| Defendant. | : | |

- - - - - x

Plaintiff, by its attorneys, Chadbourne, Parke,
Whiteside & Wolff, complaining of the defendant, respect-
fully alleges that:

AS AND FOR A FIRST
CAUSE OF ACTION

1. Plaintiff is and at all times hereinafter
mentioned was a corporation duly organized and existing
under the laws of the state of New Jersey and is auth-
orized to transact business in the state of New York.
Plaintiff maintains a principal office at 245 Park Avenue
in the City, County and State of New York.

2. Defendant is a foreign corporation, with
its principal place of business at 1801 Century Park
East, Suite 2300, Century City, Los Angeles, California.
Defendant maintains a regular business office at 16 East
48th Street in the City, County and State of New York.

3. Plaintiff manufacturers and sells a wide

Complaint

range of consumer products and advertises its products through various media as an important aspect of its marketing program.

4. Commencing with an issue dated June 1973, defendant has published and distributed and does so publish and distribute for sale a magazine entitled "Playgirl".

5. Prior to publication and distribution of Playgirl and in anticipation thereof, defendant solicited advertising from plaintiff.

6. On or about January 26, 1973 plaintiff and defendant entered into an agreement in writing whereby plaintiff agreed to advertise in defendant's "Playgirl" magazine and to pay for such advertisement and defendant agreed to publish same. A copy of said agreement is annexed hereto as Exhibit A and is referred to herein as the "Agreement".

7. Said Agreement provided in part that:

"Your acceptance below of this Agreement shall also serve to acknowledge our understanding [sic] that we have the continuing and irrevocable right, at our option, to buy the back cover of Playgirl each and every twelve month period, for each issue of Playgirl within that period, for as long a period as Playgirl shall continue to be published."

8. In accordance with the Agreement defendant has published or agreed to publish advertisements for plaintiff's products on the back cover of its magazine for the months of June 1973 through May 1974.

Complaint

9. In accordance with the Agreement, plaintiff has paid defendant, promptly when properly billed, for the advertisements published.

10. Defendant has advised plaintiff that "PLAYGIRL will diversify its 4th cover advertisers effective with the June 1974 issue."

11. Plaintiff has advised defendant that it would exercise its rights to advertise in defendant's magazine and to buy the back cover for the twelve month period starting June 1974 in accordance with the Agreement.

12. Plaintiff has a binding and enforceable contract with defendant which defendant has repudiated and stated that it will not honor. Plaintiff has performed all its obligations thereunder and has stated its expectation to continue to honor the Agreement and to exercise its rights thereunder.

13. Plaintiff has been advised by defendant that March 18, 1974 is the deadline date for the submission of advertising copy for the June 1974 issue of Playgirl Magazine.

14. Defendant has stated that it will refuse to accept plaintiff's advertisement for the back cover of the June 1974 issue of Playgirl Magazine in violation of the Agreement.

Complaint

15. Plaintiff will suffer serious loss and damage, in an indeterminable amount, if its advertisement does not appear on the back cover of the June 1974 issue of Playgirl Magazine and thereafter in accordance with the Agreement.

16. Plaintiff cannot precisely demonstrate and there is no accurate method to show the amount of monetary damage which defendant's intended breach of contract will cause to plaintiff.

17. Plaintiff will suffer serious and continuing loss and damage, in an increasing and indeterminable amount, for each successive month in which defendant fails to publish its advertisement on the back cover of Playgirl Magazine.

18. The back cover of Playgirl Magazine is a unique advertising property and plaintiff will not be able to obtain equivalent replacement.

19. It is essential to the preservation of plaintiff's rights and remedies that a declaratory judgment be granted by this Court declaring that the agreement, hereinabove referred to, is valid and subsisting and that the provisions contained therein are in full force and effect, and that the plaintiff is entitled to specific performance thereof by defendant as and when due.

Complaint

AS AND FOR A SECOND
CAUSE OF ACTION

20. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 18 hereof as is fully set forth herein.

21. Plaintiff has demanded that defendant fully comply with the terms of the Agreement with plaintiff and sell to plaintiff the back cover of Playgirl for advertisement for the twelve month period beginning June 1974.

22. Other than full and specific performance of the contract, plaintiff has no remedy which will preserve the benefit of its Agreement.

23. Plaintiff has no adequate remedy at law.

AS AND FOR A THIRD
CAUSE OF ACTION

24. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 18 hereof as is fully set forth herein.

25. It is the generally accepted practice in magazine advertising that advertisers have the first option of renewal for the equivalent space in corresponding issues in the following publication year.

26. Should Playgirl publish another advertiser

Complaint

on its back cover, that advertiser may claim that, in accordance with said accepted practice in magazine advertising, it is entitled to the first option of renewal for the subject space in the corresponding issues of the following publication year.

27. Therefore, unless defendant is enjoined from accepting other advertising for the back cover of this magazine, plaintiff will be in jeopardy of losing its future advertising space on the back cover of Playgirl Magazine.

28. Plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff prays that:

(1) A declaratory judgment be entered herein on its First Cause of Action, declaring the rights and other legal relations of the parties hereto in respect to the matters set forth in the complaint, and that said declaratory judgment specify the following:

(a) That the Agreement of January 26, 1973 is a binding and lawful contract;

(b) That defendant is obligated to provide the back cover of Playgirl Magazine for advertising space in the issue to be dated June 1974 and each of the next eleven monthly issues and to continue to provide the back cover of Playgirl Magazine for advertising

Complaint

space to plaintiff, at the option of plaintiff, for each successive twelve month period, as long as Playgirl Magazine shall continue to be published.

(2) Judgment be entered herein on the Second Cause of Action ordering defendant to specifically perform each and every obligation of the Agreement of January 26, 1973 and ordering defendant, its servants and agents, to accept plaintiff's advertising copy and to publish same in the issue of Playgirl Magazine to be dated June 1974 and each of the next eleven monthly issues and to continue to accept plaintiff's advertising, for each successive twelve month period, at plaintiff's option, as long as Playgirl Magazine shall continue to be published.

(3) Judgment be entered herein on the Third Cause of Action enjoining defendant from accepting any back cover advertisement from any person, corporation or other entity other than plaintiff for as long as Playgirl Magazine shall continue to be published, in each twelve month period for which plaintiff exercises its option thereto.

(4) Plaintiff have such further and different relief as the Court may find just and proper, together with the costs and disbursements of this action.

CHADBOURNE, PARKE, WHITESIDE & WOLFF
Attorneys for Plaintiff
30 Rockefeller Plaza
New York, New York 10020
Tel. (212) 541-5800

(Verified)

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EXHIBIT A--AGREEMENT DATED JANUARY 26, 1973
ANNEXED TO COMPLAINT

Identical to Exhibit A annexed to Affidavit of
Norman H. Chester printed herein at pages 21 to 23.

ANSWER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

S A M E T I T L E

ANSWER

Defendant, Playgirl, Inc., a California corporation, by its attorneys, answers the Complaint as follows:

FIRST CAUSE OF ACTION

1. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 1 and therefore denies the same and leaves plaintiff to its proof thereof except admits plaintiff is a corporation organized and existing under the laws of the State of New Jersey and maintains a principal office at 245 Park Avenue in the City, County and State of New York.

2. Admits the allegations of paragraph 2.

3. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 3 and therefore denies the same and leaves plaintiff to its proof thereof.

4. Admits the allegations of paragraph 4.

5. Denies the allegations of paragraph 5 except admits that there were discussions between employees of Carl Vann Co., Martin and Hart, and the American Tobacco Company concerning advertising space in Playgirl Magazine.

6. Denies the allegations of paragraph 6 except admits that a

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Answer

copy of the alleged agreement dated January 26, 1973, is attached to the Complaint as Exhibit A.

7. Denies the allegations of paragraph 7, the portion of the alleged agreement being inaccurately quoted therein.

8. Denies the allegations of paragraph 8 except admits that advertisements for Tareyton and Twist cigarettes, sold by the American Tobacco Company, have been accepted for printing by Playgirl Magazine.

9. Denies the allegations of paragraph 9 except admits that defendant has received payment of amounts billed to American Tobacco Co. for advertising printed.

10. Admits the allegations of paragraph 10.

11. Denies the allegations of paragraph 11.

12. Denies the allegations of paragraph 12 except admits that defendant has received payments for advertising space in Playgirl Magazine used for advertising of cigarettes of American Tobacco Co.

13. Admits the allegations of paragraph 12.

14. Denies the allegations of paragraph 14.

15. Denies the allegations of paragraph 15.

16. Denies the allegations of paragraph 16.

17. Denies the allegations of paragraph 17.

18. Denies the allegations of paragraph 18.

19. Denies the allegations of paragraph 19.

SECOND CAUSE OF ACTION

20. Answers paragraph 20 by adopting the answers to paragraphs 1 through 18.

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Answer

21. Denies the allegations of paragraph 21.
22. Denies the allegations of paragraph 22.
23. Denies the allegations of paragraph 23.

THIRD CAUSE OF ACTION

24. Answers paragraph 24 by adopting the answers to paragraphs 1 through 18.

25. Denies the allegations of paragraph 25.
26. Denies the allegations of paragraph 26.
27. Denies the allegations of paragraph 27.
28. Denies the allegations of paragraph 28.

Further answering the Complaint as separate alternative and affirmative defenses, defendant states as follows:

FIRST DEFENSE

29. The Complaint fails to state a claim against defendant upon which relief can be granted.

SECOND DEFENSE

30. The alleged agreement, dated January 26, 1973, referred to in the Complaint, provides that plaintiff have an absolute unconditioned right of cancellation, by stating, "We reserve a cancellation privilege as to the use of this space" and thereby is lacking in mutuality.

31. Said alleged agreement referred to in the Complaint is void and unenforceable for want of any consideration whatsoever.

THIRD DEFENSE

32. The portion of the alleged agreement relied on by the plaintiff, and inaccurately quoted in paragraph 7 of the Complain

as a whole recited "our understanding" of the American Tobacco Company that "at our option" "we" have certain rights; but fails to recite any obligation which defendant or any other party could obligate itself to perform and is lacking in mutuality and is unenforceable.

FOURTH DEFENSE

33. To the extent that the portion of the alleged agreement relied on by plaintiff, and inaccurately quoted in paragraph 7 of the Complaint, involves an option had by plaintiff, said option is totally without consideration and was revoked by defendant prior to exercise thereof.

FIFTH DEFENSE

34. The portion of the alleged agreement relied on by the plaintiff, and inaccurately quoted in paragraph 7 of the Complaint, was neither agreed to nor knowingly accepted by Carl Vann an independent advertising agent soliciting orders for advertising in Playgirl Magazine and who signed said agreement.

35. Said Carl Vann was not authorized by defendant to act to bind the defendant by contract or otherwise, all orders for advertising obtained by said Carl Vann being subject to acceptance by defendant.

36. Said Carl Vann did not provide a copy of said alleged agreement to defendant until the fall of 1973 at which time defendant instructed said Carl Vann that any conveyance of perpetual rights contained in said alleged agreement was not accepted by defendant, and plaintiff was so advised.

37. Defendant's printing of plaintiff's advertisements in Playgirl Magazine, prior to obtaining a copy of said alleged agreement, was in response to the receipt of monthly "insertion orders" which are customarily used in the magazine industry to request the printing of magazine advertising wholly independent of any other contract or agreement, if any, and was not a ratification of said alleged agreement by defendant.

38. Said Carl Vann did not have the authority to enter into the alleged agreement with plaintiff alleged in the Complaint.

39. The signing of said alleged agreement by Carl Vann does not bind defendant as a party thereto.

WHEREFORE, defendant prays for judgment as follows:

1. That plaintiff take nothing by the Complaint in this action;
2. That the Complaint and all causes of action thereof be dismissed with prejudice;
3. That defendant be awarded its costs of suit and reasonable attorneys fees; and
4. That defendant be awarded such other and further relief as this Court may deem just and proper.

Peter T. Cobrin
Kirschstein, Kirschstein,
Ottinger & Frank, P.C.
Attorneys for Defendant
60 East 42nd Street
New York, New York 10017
(212) 687-1098

OF COUNSEL:
Eric T. S. Chung
California Federal Plaza
5670 Wilshire Boulevard, Suite 1840
Los Angeles, California 90036
(312) 933-9161

(Verified)

AFFIDAVIT OF WILLIAM J. MILES JR. IN OPPOSITION TO MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

S A M E T I T L E

AFFIDAVIT OF
WILLIAM J. MILES JR.

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

WILLIAM J. MILES, being duly sworn, deposes and says:

1. I am Executive Vice President and Director of Advertising at Playgirl, Inc., the defendant in the above entitled action.
2. I submit this Affidavit in connection with defendant's opposition to plaintiff's motion for a preliminary injunction and other relief.

3. I have been involved with and helped plan for the publication of defendant's Playgirl Magazine since June 1972, and am familiar with the facts and circumstances of this matter as more particularly set out below.

4. On December 15, 1972, an Agreement was entered into between Playgirl, Inc. and Carl Vann Co. for the purpose of having solicited orders for advertising in the Playgirl Magazine that was planned. A copy of said Agreement is attached hereto as Exhibit A. Under the Agreement, Carl Vann Co. was to be an independent contractor (see paragraph 10, thereof) and all orders for advertising were to be subject to acceptance by Playgirl, Inc. (see paragraph 8, thereof).

Affidavit of William J. Miles Jr.

5. Said Agreement between Playgirl, Inc. and Carl Vann Co. was terminated at the end of the one year term thereof. Carl Vann is not now employed by Playgirl Inc.

6. It is customary that advertising in publications such as magazines be requested via "insertion orders". Typically, an "insertion order" is "acknowledged" by a publisher. The advertiser is billed for the requested advertising if and when the advertising is printed in the magazine or other publication. Playgirl, Inc. follows the above outlined procedure.

7. An insertion order No. 41648, dated February 12, 1973, from Batten, Barton, Durstine & Osborne, Inc. was received by Playgirl, Inc. requesting that advertising of The American Tobacco Co. for its Tareyton cigarettes be printed on the back cover of the May 1973 issue of Playgirl Magazine. A copy of said insertion order is attached hereto as Exhibit B.

8. Said insertion order dated February 12, 1973, was acknowledged by Playgirl, Inc. by an "Acknowledgement" dated February 15, 1973, a copy of which is attached hereto as Exhibit C.

9. Said order for advertising of American Tobacco Co. was thereafter cancelled by a "change in Insertion Order No. 01452", dated March 15, 1973, a copy of which is attached hereto as Exhibit D.

10. Said cancellation was acknowledged by Playgirl, Inc. by an "Acknowledgement" dated March 27, 1973, a copy of which is attached hereto as Exhibit E.

11. Such "insertion orders" for printing of Tareyton

Affidavit of William J. Miles Jr.

advertising of the American Tobacco Co. on the back cover of Playgirl Magazine were received monthly by Playgirl, Inc. and duly acknowledged. Copies of such insertion orders and corresponding acknowledgements for the June through December issues of Playgirl Magazine are collectively attached hereto as Exhibit F. The advertising for Tareyton cigarettes was printed on the back cover of the June through December issues of Playgirl Magazine in accordance with the pertinent insertion orders.

12. I first learned of the terms of the so-called Agreement, dated January 26, 1973, at issue in the above entitled matter, sometime in the fall of 1973 when it was for the first time delivered to Playgirl, Inc. by Carl Vann.

13. Carl Vann was advised that Playgirl, Inc. would not accept any obligation to forever print advertising of American Tobacco Co. on the back cover of Playgirl Magazine.

14. Carl Vann thereafter advised American Tobacco Co. that it was against the policy of Playgirl, Inc. to enter into a "contract which affords an advertiser a position of protection in perpetuity", via a letter to Ms. T. B. Fealey, dated September 25, 1973, a copy of which is attached hereto as Exhibit G.

15. For a reason unknown to me, American Tobacco Co. requested in a letter dated July 17, 1973, to John Weller from T. B. Fealey that a "duplicate copy" of the subject Agreement as issued (but newly dated March 9, 1973) be signed,

Affidavit of William J. Miles Jr.

copies of said letter and duplicate copy of said Agreement dated March 9, 1973, being collectively attached hereto as Exhibit H. Said letter dated July 17, 1973, draws special attention to the specific provisions being sought to be enforced by plaintiff by stating, "note last paragraph of contract".

16. By letter dated December 3, 1973, to Norman Chester, I advised American Tobacco Co. that Playgirl would be diversifying its back cover advertisers and proposed an advertising plan for American Tobacco Co., a copy of said letter being attached hereto as Exhibit I.

17. By letter dated December 13, 1973, from Norman Chester, American Tobacco Co. refused my proposal of December 3, 1973, a copy of said letter being attached hereto as Exhibit J.

18. By letter dated December 20, 1973, from Leo Dean to Norman Chester, Playgirl, Inc. again sought to propose an advertising schedule to the American Tobacco Co., a copy of said letter is attached hereto as Exhibit K.

19. By letter dated January 11, 1974, from Norman Chester, American Tobacco Co. again refused the proposal of Playgirl, Inc., a copy of said letter being attached hereto as Exhibit L.

20. By letters to Norman Chester dated January 17, 1974, from myself and dated January 25, 1974, from Leo J. Dean, Playgirl, Inc. again sought to meet the needs of American Tobacco Co. and thereby keep them as a customer, copies of said letters being attached hereto as Exhibits M and N, respectively. Such efforts have not been fruitful.

Affidavit of William J. Miles Jr.

21. The back cover of a magazine is a desired location for advertising due to its exposure. Customarily, advertisers purchase as a package several pages of advertising on the inside of a magazine for each back cover, as it is available, since normal demand for the back cover is high.

22. American Tobacco Co. has steadfastly refused to purchase any such package even when offered by Playgirl, Inc. at very favorable rates.

23. All advertising space in a magazine has a pre-determined rate essentially based on circulation of the magazine, location, and the amount of space involved. The back cover of Playgirl Magazine is nominally more expensive than inside covers. All other pages have various set lower rates.

24. The advertising rate for the back cover of Playgirl Magazine is presently \$13,360.00. Numerous other magazines with comparable circulation would have a comparable advertising rate applicable to the back cover thereof.

25. The contents of each Playgirl Magazine must be finalized approximately three months in advance of the scheduled date of sale to allow for printing, binding, shipment and distribution to retail outlets. Planning the contents of a magazine requires months of advance planning to have a cohesive editorial content which includes advertising. The adamant refusal of American Tobacco Co. to purchase any advertising offered by Playgirl, Inc. has forced Playgirl, Inc. to seek other advertisers for its pages and covers or be faced with the inability to finalize the magazine contents in time for printing and distribution.

Affidavit of William J. Miles Jr.

26. Accordingly, Playgirl, Inc. has at this time already committed to other advertisers the back cover of future Playgirl Magazines for each issue in the calendar year 1974. Playgirl, Inc. is not bound by custom or practice to make available future back covers of Playgirl Magazine to the same advertisers or any other advertiser.

27. I know of no custom in the magazine industry that obligates or binds a publisher to extend an opportunity of first refusal to a past advertiser. Such opportunities of first refusal are simply a courtesy extended by a publisher to its advertising customers. Playgirl, Inc. has extended several opportunities for advertising space to American Tobacco Co., none of which were accepted.

28. To now require Playgirl, Inc. to print cigarette advertisements of American Tobacco Co. after its refusals to reserve such advertising as offered by Playgirl, Inc. would now be unfair and would cause exceedingly great hardships and damage to Playgirl, Inc. as well as its other advertisers.



William J. Miles, Jr.

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) ss.

Sworn to and subscribed before me this 5th day of

March, 1974.



Judith Gay Chesky
Notary Public

EXHIBIT A--AGREEMENT DATED DECEMBER 15, 1972 ANNEXED
TO AFFIDAVIT OF WILLIAM J. MILES JR.

THE MAGAZINE

FOR WOMEN

AGREEMENT

THIS AGREEMENT made this 15th Day of December, 1972, between PLAYGIRL, INC., having its main offices at 4055 Wilshire Boulevard, Los Angeles, California 90010 and CARL VANN COMPANY, a corporation having its headquarters offices at 1385 Westwood Boulevard, Suite 202, Los Angeles, California 90024.

WITNESSETH:

1. PLAYGIRL, INC., hereinafter called PG, hereby employs CARL VANN COMPANY, hereinafter called CV, as exclusive national representative of PG with the exclusive right to solicit orders for advertising in PG MAGAZINE throughout the United States territory.
2. CV accepts such employment and agrees to devote ^{His} best efforts thereto. CV shall secure a minimum of 35 pages (paid or unpaid) for the first or March 1973 issue and each of two issues thereafter.
3. Said employment shall commence as of December 15, 1972, and shall continue for a period of one year, and shall be renewed for an additional period of one year provided notice by registered mail is not given by either party at least 90 days prior to December 15, 1973 of intention to terminate contract. Either party may terminate this Agreement during the initial term or any renewal term by three issues written notice to the other. In case of a

Exhibit A Annexed to Affidavit of William J. Miles Jr.

Page 2

90 day cancellation period CV shall not earn commissions on business generated by replacement. The address of either party to which said notice shall be sent may be changed by said party by delivery of written notice thereof to the other party.

4. PG agrees that commissions shall be payable to CV for all advertising, including new and renewal advertising in PG from those persons, firms and corporations hereinafter called Advertisers and described in Paragraph 5 without regard to whether said orders are received from CV or from said Advertisers except trade, promotional or like advertising used for PG Inc.. Said commission shall be 40 percent of the gross advertising revenue, for first 100 pages or first three issues (March, April, May 1973) unless first issue (March 1973) is printed with less than 50% of the advertising pages sold on an unpaid basis which would extend the 40% to include first four issues including June 1973 issue. Thereafter commission shall be 20% of the net advertising revenue.

5. In the event of termination or cancellation of this Agreement, commission will be paid CV, when, as and if they become payable, on all advertising scheduled or contracted from this territory for PG on PG MAGAZINE at the date of termination of the contract, provided such space appears within three issues from the date of termination.

6. Said commissions shall be due and payable on the 10th day of the month following the month in which the advertising

Exhibit A Annexed to Affidavit of William J. Miles Jr.

Page 3

was published and shall be accompanied by a statement of the accounts covered by the remittance of such commissions.

7. CV shall not be responsible for uncollected or uncollectable accounts but agrees to use reasonable efforts to assist in the collection of same. No commissions shall be paid to CV with respect to uncollected accounts.

8. All orders for advertising are subject to acceptance by PG and may be rejected by PG if unacceptable from the standpoint of quality or credit.

9. In order to assist CV in acting as Representative in said territory, PG agrees to supply CV with a reasonable number of each issue of said magazine, rate cards, stationery, and similar printed material, service, data, etc., copies of competitive media, and generally to cooperate with CV in such a manner as may be necessary or desirable in order to permit the successful solicitation of advertising in said magazine. PG agrees to accept collect telegrams and telephone calls where this type of urgent communication is in the best interests of PG.

10. Nothing in this Agreement shall be construed to create a joint venture between the parties hereto. CV shall enjoy the status of an independent contractor and CV is not an employee of PG. CV shall have privilege of stock options of PG at initial issue price.

11. All expenses such as salaries, rent, entertainment, travel

Exhibit A Annexed to Affidavit of William J. Miles Jr.

Page 4

within the territory involved in the solicitation of advertising by CV for PG shall be paid for by CV and not reimbursed by PG. However, PG agrees to pay all travel expenses, and other incidental expenses incurred while traveling outside the United States territory if PG requests CV to make such trips.

12. Recognizing that CV shall necessarily incur expenses in the initial period representation of PG before commissions from PG will commence, PG agrees to pay to CV the sum of \$1500.00 per month (Payable 1st and 15th @ \$750.00) beginning December 15, 1975 for a period of one year or until commissions reach a like amount which sum shall be treated as a guarantee for expenses and shall be deductible against commissions earned during the period of this agreement, or any renewal hereof.

13. This Agreement shall be binding upon the parties hereto, their heirs, successors and assigns.

In witness thereof the parties have executed this Agreement the day and year first hereinabove mentioned.

By William J. Miles
PLAYGIRL, INC. President

By Carl Vann
CARL VANN COMPANY

Witness W.D. May

Witness _____

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EXHIBIT B--INSERTION ORDER NO. 41648 DATED FEBRUARY 12, 1973
 ANNEXED TO AFFIDAVIT OF WILLIAM J. MILES JR.

LOS ANGELES • MINNEAPOLIS • MONTREAL • NEW YORK • SAN FRANCISCO • TORONTO

ORDER FOR ADVERTISING FROM

BATTEN, BARTON, DURSTINE & OSBORN, INC.

383 MADISON AVENUE
 NEW YORK, N. Y. 10017

NEW YORK

No. 41648

FEBRUARY 12, 1973

DATE _____

PAPER NO. _____

CL-111111

PRODUCT 111111

TO ADV. DEPT.: PLAYGIRL
 SUITE 420
 4055 WILSHIRE BOULEVARD
 LOS ANGELES, CALIFORNIA 90010

CHECK ONE (RATE & POSITION)

RATE CLASS: _____

S SCALE

C.I.D.

FLAT ROP

SPECIAL

RATE

POSITION: _____

ROP

PAID

PLEASE INSERT ADVERTISING AS FOLLOWS

ADVERTISER: THE AMERICAN TOBACCO COMPANY

PRODUCT: TAREYTON AUTH.E-27 E&S#1

| AD NO. | SUBJECT | DATE OF INSERTION | SPACE ORDERED* | TOTAL SPACE ORDERED | INSTRUCTIONS |
|-------------------------|--|----------------------|------------------------------------|---------------------------|---|
| 3-355 AD NO. 73-1 | US TAREYTON SMOKERS | MAY, 1973 | 1 PAGE (7x10) 4 COLORS (OFFSET) | | Proof is for identification only. Charge in accordance with BBDO Contract. Send bills, in duplicate, to BBDC ACCOUNTING SERVICES DIVISION 383 Madison Avenue New York, N.Y. 10017. We reserve the right not to pay bills unless copies of publication have been received. Send copies of tear sheets through your normal tear- page distribution service or directly to BBDO Accounting. |
| | POSITION: BACK COVER | | | | PRODUCTION BILLING NOTE Should any production charges be incurred for inserting the advertising authorized by this order, a separate bill MUST be rendered. |
| | MATERIAL: COLOR PROOF HEREWITH. | | | | * Please show client name, issue date, advertisement number and this order number on your bill. |
| | PUR NOTE: SCOTCH PRINT FOR OFFSET PRINTING, 2 PROGRESSIVES AND 6 COLOR PROOFS SHIPPED VIA AIR EXPRESS ON FEBRUARY 12, 1973 DIRECT TO: NOTE: FAWCETT PUBLICATION, 4545 TOHEY AVENUE, LINCOLNWOOD, ILLINOIS. | | | | * Send bill for production charges to THIS office - Attention: Print Operations Department. |
| | NOTE: THE TAR & NICOTINE FIGURES AS OF FTC REPORT AUG'72 AND CAUTION NOTICE ARE A PART OF AND MUST BE INCLUDED IN THIS ADVERTISEMENT. | | | | Please do NOT include production charges on your space bill. |
| | NOTE: Separate this advertisement by at least six (6) pages from any cigarette or any advertisement which is incompatible to any of our cigarette advertising or which reflect adversely upon cigarettes. | | | | |
| | NOTE: Cigarette brands of our manufacturer should be separated by at least twelve (12) pages. NB: This advertisement is to be positioned as specified, if unable to position as shown, you agree to advise us. AND DO NOT SEND THIS AD TO ANYONE ELSE. | | | | |
| | NOTE: PLEASE SEND 2 COMPLETE COPIES OF THIS MAGAZINE IN WHICH THIS AD APPEARS ALONG WITH 6 MECHANICAL REQUIREMENT CARDS TO: MR. C. MEOLA, BBDO, 383 MADISON AVENUE, NEW YORK, NEW YORK, 10017 FOR REPRODUCTION CHECK. | | | | |
| | NOTICE: "The compensation and other charges, if any, covered by this contract (order) shall be subject to any adjustment required by the Economic Stabilization Order issued by President Nixon on August 15, 1971, or regulations or rulings thereunder or any additional Orders pertaining to the same subject matter. Should it be determined that any compensation or charges are excessive under the Economic Stabilization Order or any subsequent regulations or rulings thereunder, or any additional Orders pertaining to the same subject matter, BBDO will seek recovery on behalf of its clients for such excessive compensation or charges. Your acceptance of this contract (order) signifies your understanding of and agreement to the foregoing." | | | | |
| | IMPORTANT NOTE: Reproduction material should match proof attached UNLESS proof is marked "Identification only - material is correct." Please check. If proof and material do not agree, please contact this office. | | | | |

BY _____ ESME MCGOWAN

BATTEN, BARTON, DURSTINE & OSBORN, INC.

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EXHIBIT C--ACKNOWLEDGMENT DATED FEBRUARY 15, 1973 ANNEXED
TO AFFIDAVIT OF WILLIAM J. MILES JR.

ACKNOWLEDGMENT

Entertainment Weekly Inc.

THE MAGAZINE FOR WOMEN

4055 WILSHIRE BOULEVARD
SUITE 420
LOS ANGELES, CALIFORNIA 90010

February 15, 1973

| AGENCY | ADVERTISER |
|--|---|
| Entertainment Weekly Inc. 4055 Wilshire Boulevard Suite 420 Los Angeles, California 90010 | Entertainment Pictures Inc. 1000 Wilshire Blvd. Los Angeles, California 90010 |

THE FOLLOWING HAS BEEN RECEIVED:

| CONTRACT # | DATE | INSERTION ORDER # | DATE |
|------------|------|-------------------|-------------------|
| | | 10000 | February 15, 1973 |

| ISSUE(S) | UNIT | KEY | RATE/FREQUENCY | PRODUCTION MATERIAL |
|------------|----------------------------|---------------------|----------------|---------------------|
| Feb., 1973 | 4055 Wilshire Suite 420 | 2-25 ad no. 72-1 | 16 | R. S. 170 |

REMARKS

Not on sale date April 10, 1973.

Thank You

PUBLISHER'S COPY

ONLY COPY AVAILABLE

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EXHIBIT D--CHANGE IN INSERTION ORDER NO. 07452
DATED MARCH 15, 1973 ANNEXED TO AFFI-
DAVIT OF WILLIAM J. MILES JR.

LOS ANGELES • MINNEAPOLIS • MONTREAL • NEW YORK • SAN FRANCISCO • TORONTO

BATTEN, BARTON, DURSTINE & OSBORN

INCORPORATED

383 MADISON AVENUE, NEW YORK, N.Y. 10017

No. 01452

PLAYGIRL

To Publisher _____
SUITE 420 _____
4055 WILSHIRE BOULEVARD _____
LOS ANGELES, CALIFORNIA 90010 _____

MARCH 15, 1973

Date _____

Change in Insertion Order—Important

Advertiser THE AMERICAN TOBACCO COMPANY TAREYTON AUTHE-27 E&S#1
Our Order No. 383 41648
Space 1 PAGE 4 COLORS OFFSET
Copy No. 3-355
Subject US TAREYTON SMOKERS AD NO. 73-1
Scheduled for Insertion MAY, 1973

XXXXXX XXXX XXXX XXXX XXXX

Cancel THIS ADVERTISEMENT.

NOTE: PUBLICATION NOT PUBLISHING THIS ISSUE.

NOTE: PUBLICATION TO RETURN ALL PRINTING MATERIAL TO: MR. C. MEOLA, BBDO, 383 MADISON AVENUE, NEW YORK, NEW YORK 10017.

BATTEN, BARTON, DURSTINE & OSBORN, Inc.

ROSE MILIONE

By _____

Please let us have acknowledgment from you of receipt of this change

EXHIBIT E--ACKNOWLEDGMENT DATED MARCH 27, 1973 ANNEXED
TO AFFIDAVIT OF WILLIAM J. MILES JR.

ACKNOWLEDGMENT

Playgirl Inc.

THE MAGAZINE FOR WOMEN

4055 WILSHIRE BOULEVARD
SUITE 420
LOS ANGELES, CALIFORNIA 90010

March 27, 1973

AGENCY

Rose Milione
Edition, Burton, Durstine & Osborne
383 Madison Avenue
New York, N.Y. 10017

ADVERTISER

The American Tobacco Company
Taravon

THE FOLLOWING HAS BEEN RECEIVED:

| CONTRACT # | DATE | INSERTION ORDER # | DATE |
|------------|------|-------------------|----------------|
| | | Cancellation | March 15, 1973 |

| ISSUE(S) | UNIT | KEY | RATE/FREQUENCY | PRODUCTION MATERIAL |
|------------------------|----------|-----|----------------|---------------------|
| May 1973 <i>gme</i> | 4/c Page | | | Received |

REMARKS

Note: Cancellation due to change in publication date from May 1973
to June 1973.

Publication tp return all printing material to: Mr. C. Meola, BBDO, 383 Madison Av.
New York, New York 10017

Thank You

BILLING COPY

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EXHIBIT F--COPIES OF INSERTION ORDERS AND ACKNOWLEDGMENTS
FOR JUNE THROUGH DECEMBER ISSUES ANNEXED TO
AFFIDAVIT OF WILLIAM J. MILES JR.

AMSTERDAM • ATLANTA • BOSTON • BRUSSELS • CLEVELAND • DALLAS • DETROIT • DÜSSELDORF • LONDON

LOS ANGELES • MINNEAPOLIS • MONTREAL • NEW YORK • SAN FRANCISCO • TORONTO

ORDER FOR ADVERTISING FROM

BATTEN, BARTON, DURSTINE & OSBORN, INC.

383 MADISON AVENUE
NEW YORK, N.Y. 10017

NEW YORK

No. 46633

DATE MARCH 19, 1973

PAPER NO. _____

CLIENT(S) PRODUCT(S)

TO ADV. DEPT., PLAYBOY MAGAZINE
SUITE 420
4055 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90010

CHECK ONE (RATE & POSITION)

RATE CLASS:

S/SCALE

C.I.B.

FLAT ROP

SPECIAL

PAID

POSITION:

ROP

PAID

L PLEASE INSERT ADVERTISING AS FOLLOWS

ADVERTISER: THE AMERICAN TOBACCO COMPANY
PRODUCT: TAREYTON AUTH.D-27 EAS#1

| AD NO. | SUBJECT | DATE OF INSERTION | SPACE ORDERED | TOTAL SPACE ORDERED | DAY | PAGE | TOTAL SPACE ORDERED | DAY | PAGE | TOTAL SPACE CHECKED |
|---------|-----------------------------------|----------------------|-------------------------------------|---------------------------|-----|------|---------------------------|-----|------|---------------------------|
| 3-457 | US TAREYTON SMOKERS (McCARRON) | JUNE, 1973 | 1 PAGE (7 x10) 4 COLOR . .OFFSET | | | | | | | |
| AD NO.2 | | | | | | | | | | |

POSITION: BACK COVER.

MATERIAL: SCOTCHPRINT FOR OFFSET PRINTING, 2 PROGRESSIVES AND 4 COLOR PROOFS SHIPPED VIA AIR EXPRESS ON MARCH 19th DIRECT TO: FAUCETT PUBLICATION, 4545 Touhey AVENUE, LINCOLNWOOD, ILLINOIS. PROOFS HEREWITH.

NOTE: THE TAR & NICOTINE FIGURES AS OF FTC REPORT FEB. '73 AND CAUTION NOTICE ARE A PART OF AND MUST BE INCLUDED IN THIS ADVERTISEMENT.

NOTE: PLEASE SEND 5 COMPLETE COPIES OF THIS MAGAZINE IN WHICH THIS AD APPEARS ALONG WITH MECHANICAL REQUIREMENT CARDS TO: MR. C. NECLA, BBDO, 383 MADISON AVENUE, NEW YORK, NEW YORK 10017 FOR REPRODUCTION CHECK.

NOTE: Separate this advertisement by at least six (6) pages from any cigarette or any advertisement which is incompatible to any of our cigarette advertising or which reflect adversely upon cigarettes.

NOTE: Cigarette brands of our manufacture should be separated by at least twelve (12) pages. NOTE: This advertisement is to be positioned as specified, if unable to position as shown, you agree to advise MR. ARNOLD ROSS OF BBDO, NEW YORK, prior to cancellation date.

NOTICE: "The compensation and other charges, if any, covered by this contract (order) shall be subject to any adjustment required by the Economic Stabilization Order issued by President Nixon on August 15, 1971, or regulations or rulings thereunder or any additional Orders pertaining to the same subject matter. Should it be determined that any compensation or charges are excessive under the Economic Stabilization Order or any subsequent regulations or rulings thereunder, or any additional Orders pertaining to the same subject matter, BBDO will seek recovery on behalf of its clients for such excessive compensation or charges. Your acceptance of this contract (order) signifies your understanding of and agreement to the foregoing."

BY

BBDO MILIONE

BATTEN, BARTON, DURSTINE & OSBORN, INC.

A 99

Exhibit F Annexed to Affidavit of William J. Miles Jr.

ACKNOWLEDGMENT

Playgirl Inc.

THE MAGAZINE FOR WOMEN

4055 WILSHIRE BOULEVARD
SUITE 420
LOS ANGELES, CALIFORNIA 90010

March 27, 1973

AGENCY

McCann, Erickson, Burstein & Osborn, Inc.
4055 Wilshire Blvd.
Los Angeles, Calif. 90017

Attn: Ms. Rose Milone

ADVERTISER

The American Business Company
120 Wall Street

THE FOLLOWING HAS BEEN RECEIVED:

| CONTRACT # | DATE | INSERTION ORDER # | DATE |
|------------|------|-------------------|----------------|
| | | 40003 | March 29, 1973 |

| ISSUE(S) | UNIT | KEY | RATE/FREQUENCY | PRODUCTION MATERIAL |
|-----------|------------------------|-----|----------------|---------------------|
| June 1973 | 4/c Rate Back Cover | | \$5,000. | Received |

REMARKS

Note: June issue on sale date June 15, 1973.

Send 5 complete copies of this magazine in which this ad appears along with mechanical requirement cards to: Mr. C. Meola, BBDO, 383 Madison Ave., N.Y., N.Y. 10017 for reproduction check.

Thank You

BILLING COPY

A 100

Exhibit F Annexed to Affidavit of William J. Miles Jr.

ATLANTA • BOSTON • CHICAGO • CLEVELAND • DALLAS • DENVER • DUSSELDORF • LONDON
LOS ANGELES • MINNEAPOLIS • MONTREAL • NEW YORK • SAN FRANCISCO • TORONTO

ORDER FOR ADVERTISING FROM

BATTEN, BARTON, DURSTINE & OSBORN, INC.

383 MADISON AVENUE
NEW YORK, N.Y. 10017

NEW YORK

No. 48671

DATE: APRIL 18, 1973

PAPER NO. _____

CLIENT: 21

PRODUCT: 21

TO ADV. DEPT
PLAYGIRL
SUITE 420
4055 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90010

CHECK ONE (RATE & POSITION)

RATE CLASS: S SCALE C.I.D.

FLAT ROP SPECIAL RATE

POSITION: ROP PAID

PLEASE INSERT ADVERTISING AS FOLLOWS

ADVERTISER THE AMERICAN TOBACCO COMPANY
PRODUCT TAR EYTON AUTH. #27 PAS#1

| AD NO. | SUBJECT | DATE OF INSERTION | SPACE ORDERED | TOTAL SPACE ORDERED | INSTRUCTIONS |
|--------|------------------------------------|----------------------|----------------------------------|---------------------------|---|
| 3-693 | THERE'VE BEEN 24 (SPOTLIGHT AD) | JULY, 1973 | 1 PAGE (7x10) 4 COLORS OFFSET | | Proof is for identification only. Charge in accordance with BBDO Contract. Send bills, in duplicate, to BBDO ACCOUNTING SERVICES DIVISION 383 Madison Avenue New York, N.Y. 10017. |

POSITION: BACK COVER.

MATERIAL: SCOTCH PRINT FOR OFFSET PRINTING, 3 PROGRESSIVES AND
6 COLOR PROOFS HEREWITH.

NOTE: THE TAR & NICOTINE FIGURES AS OF FTC REPORT FEB. '73 AND CAUTION
NOTICE ARE A PART OF AND MUST BE INCLUDED IN THIS ADVERTISEMENT.

NOTE: PLEASE HOLD PRINTING MATERIAL IN YOUR FILES FOR FUTURE INSERTIONS.

NOTE: Separate this advertisement by at least six (6) pages from any
Cigarette or any advertisement which is incompatible to any of our cigarette
advertising or which reflect adversely upon cigarettes.

NOTE: Cigarette brands of our manufacture should be separated by at least
twelve (12) pages. NOTE: This advertisement is to be positioned as
specified, if unable to position as shown, you agree to advise
MR. ARTHUR BOSS OF BBDO, NEW YORK, prior to cancellation date.

NOTE: PLEASE SEND 4 COMPLETE COPIES OF MAGAZINE IN WHICH THIS ADVERTISEMENT
APPEARS TO: MR. C. MEOLA, BBDO, NEW YORK FOR REPRODUCTION CHECK.

NOTICE: "The compensation and other charges, if any, covered by this contract (order) shall be subject
to any adjustment required by the Economic Stabilization Order issued by President Nixon on August 15,
1971, or regulations or rulings thereunder or any additional Orders pertaining to the same subject matter.
Should it be determined that any compensation or charges are excessive under the Economic Stabilization
Order or any subsequent regulations or rulings thereunder, or any additional Orders pertaining to the same
subject matter, BBDO will seek recovery on behalf of its clients for such excessive compensation or charges."
REPRODUCTION MATERIAL SHOULD MATCH PROOF MATERIAL UNLESS PROOF IS MARKED
"IDENTIFICATION ONLY - MATERIAL IS CORRECT." Please check. If proof and material do not agree, please
contact this office.

PRODUCTION BILLING NOTE

Any production
charges be incurred for
inserting the advertising
authorized by this order, a
separate bill MUST be
rendered.

Please show client name, issue
date, advertisement number
and this order number on
your bill.

Send bill for production
charges to THIS office -
Attention: Print Operations
Department.

Please do NOT include
production charges on your
space bill.

BATTEN, BARTON, DURSTINE & OSBORN, INC.

BY

ROSE MILDE

A 101

Exhibit F Annexed to Affidavit of William J. Miles Jr.

ACKNOWLEDGMENT

Playgirl Inc.

THE MAGAZINE FOR WOMEN

4055 WILSHIRE BOULEVARD
SUITE 420
LOS ANGELES, CALIFORNIA 90010

May 30, 1973

WJ

AGENCY

Batten, Barton, Durstine & Osborn, Inc.
383 Madison Avenue
New York, N.Y. 10017

ADVERTISER

The American Tobacco Company
Lancaster

THE FOLLOWING HAS BEEN RECEIVED:

| CONTRACT # | DATE | INSERTION ORDER # | DATE |
|------------|------|-------------------|----------------|
| | | 4C671 | April 18, 1973 |

| ISSUE(S) | UNIT | KEY | RATE/FREQUENCY | PRODUCTION MATERIAL |
|-----------|------------------------|-----|----------------|---------------------|
| July 1973 | 4/C Page Back Cover | | | Received |

REMARKS

Please send 4 complete copies of magazine in which this advertisement appears to:
Mr. C. Meola, BBDO, New York for reproduction check.

Norman Rockwell

ART DEPARTMENT COPY

ONLY COPY AVAILABLE

A 102

Exhibit F Annexed to Affidavit of William J. Miles Jr.

ORDER FOR ADVERTISING FROM

BATTEN, BARTON, DURSTINE & OSBURN, INC.
383 MADISON AVENUE
NEW YORK, N.Y. 10017

NEW YORK No. 04843 E

DATE MAY 18, 1973

TO ADV. DEPT. PLAYGIRL
SUITE 400
4055 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90010

PAPER NO.
CLIENT: PRODUCT:

PLEASE INSERT ADVERTISING AS FOLLOWS

ADVERTISER AMERICAN TOBACCO COMPANY
PRODUCT TAREYTON AUTH. E-27 EAS #1

CHECK ONE (RATE & POSITION)

| | | |
|-------------|-----------------------------------|----------------------------------|
| RATE CLASS: | <input type="checkbox"/> S SCALE | <input type="checkbox"/> C.I.D. |
| POSITION: | <input type="checkbox"/> FLAT ROP | <input type="checkbox"/> SPECIAL |
| | <input type="checkbox"/> ROP | <input type="checkbox"/> RATE |
| | <input type="checkbox"/> PAID | |

| AD NO. | CAPTION | DATE OF INSERTION | SPACE ORDERED | TOTAL SPACE ORDERED | SPACE BILLING INSTRUCTIONS |
|--------|---|----------------------|-------------------------------------|---------------------------|---|
| 2-210 | US TAREYTON SMOKERS AD TO. (RIBSELL) | AUGUST, 1973 | 1 PAGE (7 x 10) 4 COLORS OFFSET | | Charge in accordance with BBDO Contract. Send bills, in duplicate, to BBDO Accounting Services Division 383 Madison Avenue New York, N.Y. 10017 |

POSITION: BACK COVER.

MATERIAL: 4 COLOR SCOTCHPRINTS FOR OFFSET PRINTING, COLOR PROOFS AND PROGRESSIVES HEREWITH.

NOTE: TAR & NICOTINE FIGURES AS OF FTC REPORT FEB. '73 AND CAUTION NOTICE ARE A PART OF AND MUST BE INCLUDED IN THIS ADVERTISEMENT.

NOTE: PLEASE HOLD PRINTING MATERIAL IN YOUR FILES FOR FUTURE USE.

NOTE: PLEASE SEND ONE COPY OF MAGAZINE IN WHICH THIS ADVT APPEAR TO: Mr. C. MOLA, BBDO, 383 MADISON AVE., N.Y. FOR REPRODUCTION CHECK.

NOTE: Separate this advertisement by at least six (6) pages from any Cigarette or any advertisement which is incompatible to any of our Cigarette advertising or which reflect adversely upon cigarettes.
NOTE: Cigarette brands of our manufacture should be separated by at least twelve (12) pages. NOTE: This advertisement is to be positioned as specified, if unable to position as shown, you agree to advise Mr. Arnold Ross of BBDO New York prior to cancellation date.

PRODUCTION BILLING
INSTRUCTIONS

- Should any production charges be incurred for inserting the advertising authorized by this order, a separate bill MUST be rendered.
- Show client name, issue date, advertisement number and this order number on your bill.
- Send bill for production charges to THIS office—ATTN: Print Operations Department.

Please do NOT include production charges on your space bill.

REPRODUCTION MATERIAL should match proof attached UNLESS proof is marked "Identification only — material is correct." Please check. If proof and material do not agree, contact:
CARMEN MEDLA

NOTICE: The compensation, and other charges, if any, covered by this contract (order) shall be subject to any adjustment required by the Economic Stabilization Order issued by President Nixon on August 15, 1971, or regulations or rulings thereunder or any additional Orders pertaining to the same subject matter. Should it be determined that any compensation or charges are excessive under the Economic Stabilization Order or any subsequent regulations or rulings thereunder, or any additional Orders pertaining to the same subject matter, BBDO will seek recovery on behalf of its clients for such excessive compensation or charges. Your acceptance of this contract (order) signifies your understanding of and agreement to the foregoing.

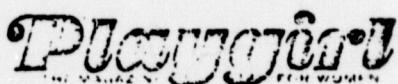
ROSE MILIONE

By

A 103

Exhibit F Annexed to Affidavit of William J. Miles Jr.

ACKNOWLEDGMENT



PLAYGIRL INC. 1801 CENTURY PARK EAST, SUITE 2300
CENTURY CITY, LOS ANGELES, CALIF. 90067
(213) 553-8008

W-103, 1573

AGENCY
Hutton, Teitelow, Valentine & Company, Inc.
363 Madison Avenue
New York, New York 10017
(212) 582-5100

ADVERTISER
The American Tobacco Company
(Camel Cigarettes)

THE FOLLOWING HAS BEEN RECEIVED:

| CONTRACT # | DATE | INSERTION ORDER # | DATE |
|------------|------|-------------------|---------|
| | | 6403 | 5/10/73 |

| ISSUE(S) | UNIT | KEY | RATE/FREQUENCY | PRODUCTION MATERIAL |
|-----------|-----------------------|-----|----------------|---------------------|
| May, 1973 | 363 COPIES 4/color | | \$5200.00 | RECEIVED |

REMARKS

Enclosed copy of magazine in which this ad appears to: A. L. Main, 320 Madison Avenue, New York 10017

Thank You

A 104

Exhibit F Annexed to Affidavit of William J. Miles Jr.

LONDON • MONTREAL • TORONTO • NEW YORK • NEW YORK • TORONTO

ORDER FOR ADVERTISING FROM

BATTEN, BARTON, DURSTINE & OSBORN, INC.

383 MADISON AVENUE
NEW YORK, N. Y. 10017

NEW YORK

No. 48554

JUN 13, 1973

DATE

PAPER NO.

100 ELLIPTICAL

CLIENT'S

PRODUCT'S

TO ADV. DEPT. PLAYGIRL
SUITE 420
4055 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90010

CHECK ONE (RATE & POSITION)

RATE CLASS:

S SCALE

C.I.D.

FLAT ROP

S

SPECIAL

RATE

POSITION:

ROP

PAID

PLEASE INSERT ADVERTISING AS FOLLOWS

ADVERTISER THE AMERICAN TOBACCO COMPANY
PRODUCT TAREYTON AUTH E-27 485#1

| AD NO | SUBJECT | DATE OF INSERTION | SPACE ORDERED | TOTAL SPACE ORDERED | INSTRUCTIONS |
|-------|-------------------------------|----------------------|-------------------------------------|---------------------------|---|
| 3-940 | US TAREYTON SMOKERS (RISSELL) | SEPTEMBER, 1973 | 1 PAGE (7 x 10) 4 COLOR - OFFSET | | Proof is for identification only. Charge in accordance with BBDO Contract. Send bills, in duplicate, to BBDO ACCOUNTING SERVICES DIVISION 383 Madison Avenue New York, N.Y. 10017. |
| AD #3 | | | | | We reserve the right not to pay bills unless copies of publication have been received. Send copies of tear sheets through your normal tear-page distribution service or directly to BBDO Accounting. |

POSITION: BACK COVER

MATERIAL: PROOF FOR IDENTIFICATION HEREWITH. YOU HAVE MATERIAL AS THIS IS A REPEAT OF THE AUGUST, 1973 ISSUE.

NOTE: TAR AND NICOTINE FIGURES AS OF FTC REPORT FEB. '73 AND CAUTION NOTICE ARE A PART OF THE MUST BE INCLUDED IN THIS AD.

PLEASE SEND A COMPLETE COPY OF MAGAZINE IN WHICH THIS AD APPEAR TO MR. C. MEOLA, BBDO, 383 MADISON AVENUE, NEW YORK, NEW YORK 10017.

NOTE: Separate this advertisement by at least six (6) pages from any cigarette or any advertisement which is incompatible to any of our cigarette advertising or which reflect adversely upon cigarettes.

NOTE: Cigarette brands of our manufacture should be separated by at least twelve (12) pages. NOTE: This advertisement is to be positioned as specified, if unable to position as shown, you agree to advise MR. ARNOLD ROSS OF BBDO, NEW YORK, prior to cancellation date.

HOLD PRINTING MATERIAL IN YOUR FILES FOR FUTURE USE.

NOTICE: "The compensation and other charges, if any, covered by this contract (order) shall be subject to any adjustment required by the Economic Stabilization Order issued by President Nixon on August 15, 1971, or regulations or rulings thereunder or any additional Orders pertaining to the same subject matter. Should it be determined that any compensation or charges are excessive under the Economic Stabilization Order or any subsequent regulations or rulings thereunder, or any additional Orders pertaining to the same subject matter, BBDO will seek recovery on behalf of its clients for such excessive compensation or charges. Acceptance of this contract (order) signifies your understanding of and agreement to the foregoing." *(Signature)* UNLESS *initials* are marked "Identification only," material is correct. Please check. If proof and material do not agree, please contact this office.

Please do NOT include production charges on your space bill.

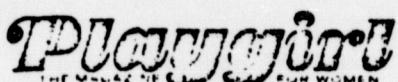
CARMEN MEOLA

BATTEN, BARTON, DURSTINE & OSBORN, INC.

A 105

Exhibit F Annexed to Affidavit of William J. Miles Jr.

ACKNOWLEDGMENT



PLAYGIRL INC. 1801 CENTURY PARK EAST SUITE 2200
CENTURY CITY, LOS ANGELES, CALIF. 90067
(213) 955-8000

6/16

AGENCY
Patten, Barton, Durstine & Gould, Inc.
35 Madison Avenue
New York, New York 10017
N.Y.C. House Millions

ADVERTISER
The American Tobacco Company
(Tarreyton)

THE FOLLOWING HAS BEEN RECEIVED:

| CONTRACT # | DATE | INSERTION ORDER # | DATE |
|------------|------|-------------------|---------|
| | | 4664 | 6/13/73 |

| ISSUE(S) | UNIT | KEY | RATE/FREQUENCY | PRODUCTION MATERIAL |
|-----------------|-----------|-----|----------------|-----------------------|
| September, 1973 | 4th cover | | \$600.00 | Repeat of Aug. '73 Ad |

REMARKS

Send one complete copy of magazine in which this ad appears to
Mr. C. Meola, P.M.D., 313 Madison Avenue, New York 10017.
Two and one-half figures must be included in ad.

Thank You

A 106

Exhibit F Annexed to Affidavit of William J. Miles Jr.

ORDER FOR ADVERTISING FROM

BATTEL BARTON DURSTINE & OSIRN. INC.
383 MADISON AVENUE
NEW YORK, N.Y. 10017

NEW YORK No. 10734

DATE JULY 5, 1973

TO ADV. DEPT. PLAYGIRL
SUITE 420
4055 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90010

PAPER NO.
CLIENT: PRODUCT:

PLEASE INSERT ADVERTISING AS FOLLOWS

ADVERTISER THE AMERICAN TOBACCO COMPANY
PRODUCT TAREYTON AUTH E-27 E&S#1

CHECK ONE (RATE & POSITION)

RATE CLASS: S SCALE C.I.D.
 FLAT ROP SPECIAL RATE
POSITION: ROP PAID

| AD NO. | CAPTION | DATE OF INSETION | SPACE ORDERED | TOTAL SPACE ORDERED | SPACE BILLING INSTRUCTIONS |
|----------------|-----------------------------------|---------------------|-------------------------------------|---------------------------|--|
| 3-467 ADV 2 | US TAREYTON SMOKERS (McCARRON) | OCTOBER, 1973 | 1 PAGE (7 x 10) 4 COLORS -OFFSET | | Charge in accordance with BBDO Contract. |
| | POSITION: BACK COVER | | | | Send bills, in duplicate, to BBDO Accounting Services Division 383 Madison Avenue New York, N.Y. 10017 |

MATERIAL: PROOF HEREWITH FOR IDENTIFICATION. THIS AD IS A REPEAT
OF THE JUNE, 1973 ISSUE: *Ad No. 3-467*
AD NO. -

TAR AND NICOTINE FIGURES AS OF FTC REPORT FEB.'73 AND CAUTION
NOTICE ARE A PART OF AND MUST BE INCLUDED IN THIS AD.

✓ PLEASE SEND 2 COMPLETE COPIES OF THIS MAGAZINE WHICH THIS AD
APPEARS TO MR. C. MEOLA, BBDO, 383 MADISON AVENUE, NEW YORK CITY

PLEASE HOLD PRINTING MATERIAL IN YOUR FILES FOR FUTURE USE.

NOTE: Separate this advertisement by at least six (6) pages from
any Cigarette or any advertisement which is incompatible to any of
our Cigarette advertising or which reflect adversely upon cigarettes

NOTE: Cigarette brands of our manufacture should be separated by
at least twelve (12) pages. NOTE: This advertisement is to be
positioned as specified, if unable to position as shown, you agree
to advise Mr. Arnold Ross of BBDO New York prior to cancellation
date.

PRODUCTION BILLING
INSTRUCTIONS

- Should any production charges be incurred
for inserting the advertising authorized by
this order, a separate bill MUST be rendered.
- Show client name, issue date, advertisement
number and this order number on your bill.
- Send bill for production charges to THIS
office—ATTN: Print Operations Department.

Please do NOT include production
charges on your space bill.

REPRODUCTION MATERIAL should
match proof attached UNLESS proof is
marked "Identification only—material is
correct." Please check. If proof and ma-
terial do not agree, contact:

CARMEN MEDLA

By ROSE MILIONE

NOTICE: The compensation and other charges, if any, covered by this contract (order) shall be subject
to any adjustment required by the Economic Stabilization Order issued by President Nixon on August 15,
1971, or regulations or rulings thereunder or any additional Orders pertaining to the same subject matter.
Should it be determined that any compensation or charges are excessive under the Economic Stabilization
Order or any subsequent regulations or rulings thereunder, or any additional Orders pertaining to the same
subject matter, BBDO will seek recovery on behalf of its clients for such excessive compensation or charges.
Your acceptance of this contract (order) signifies your understanding of and agreement to the foregoing."

A 107

Exhibit F Annexed to Affidavit of William J. Miles Jr.

ACKNOWLEDGMENT

Playgirl Inc.

THE MAGAZINE FOR WOMEN

4055 WILSHIRE BOULEVARD
SUITE 420
LOS ANGELES, CALIFORNIA 90010

AGENCY

Batten, Burson, Burstin & Caborn, Inc.
363 Madison Avenue
New York, New York 10017

ATTN: Mrs. Millions

ADVERTISER

The American Tobacco Co.
Layton Cigarettes

THE FOLLOWING HAS BEEN RECEIVED:

| CONTRACT # | DATE | INSERTION ORDER # | DATE |
|------------|------|-------------------|---------|
| | | 10734 | 7-5-'73 |

| ISSUE(S) | UNIT | KEY | RATE/FREQUENCY | PRODUCTION MATERIAL |
|--------------|---------------------|-----|----------------|---------------------|
| OCTOBER 1973 | Dail. Unit 4'x6' | 4-1 | .75 | 6 RECEIVED |

REMARKS

Send 2 complete copies to Mr. G. Peola BRI, 363 N. DISON VENUE,
NEW YORK, NEW YORK 10017

Thank You

LM

ADVERTISING DIRECTOR'S COPY

A 108

Exhibit F Annexed to Affidavit of William J. Miles Jr.

ORDER FOR ADVERTISING FROM
BATTEN BARTON DURSTINE & OSORN INC.
393 MADISON AVENUE NEW YORK, N.Y. 10017

✓ CW
NEW YORK No. 11077

DATE AUGUST 7, 1973

TO ADV. DEPT. PLAYGIRL
SUITE 420
4755 WILCHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90017

PAPER NO. _____
CLIENT NO. _____
PRODUCT NO. _____

PLEASE INSERT ADVERTISING AS FOLLOWS

ADVERTISER THE AMERICAN TOBACCO COMPANY
PRODUCT TAREYTON AUTHE-27 E&S#1

CHECK ONE (RATE & POSITION)

RATE CLASS: S SCALE C.I.E.
PLAY ROP SPECIAL S RATE
POSITION: ROP PAID

| AD NO | CAPTION | DATE OF INSERTION | SPACE ORDERED | TOTAL SPACE ORDERED | SPACE BILLING INSTRUCTIONS |
|-----------|------------------|----------------------|------------------|---------------------------|---|
| 3-910 113 | TAREYTON SMOKERS | NOVEMBER, 1973 | 1 PAGE (7 x 10) | | Charge in accordance with BBDO Contract |
| AD NO. 3 | (RISSELL) | | 4 COLUMNS OFFSET | | Send bills, in duplicate, to BBDO Accounting Services Division 383 Madison Avenue New York, N.Y. 10017 |

POSITION: BACK COVER.

MATERIAL: PROOF HEREWITH FOR IDENTIFICATION. YOU HAVE MATERIAL AS THIS
IS A (REPEAT OF SEPTEMBER, 1973 INSERTION)

NOTE: TAR & NICOTINE FIGURES AS OF FTC REPORT FEB '73 AND CAUTION NOTICE
ARE A PART OF AND MUST BE INCLUDED IN THIS ADVERTISEMENT.

NOTE: PLEASE SEND A COMPLETE COPY OF MAGAZINE IN WHICH THIS ADVERTISEMENT
APPEARS TO: MR. C. MEDLA, BBDO, 383 MADISON AVENUE, NEW YORK,
NEW YORK 10017 FOR REPRODUCTION CHECK.

NOTE: Separate this advertisement by at least six (6) pages from
any Cigarette or any advertisement which is incompatible to any of
our Cigarette advertising or which reflect adversely upon cigarettes.
NOTE: Cigarette brands of our manufacture should be separated by
at least twelve (12) pages. NOTE: This advertisement is to be
positioned as specified, if unable to position as shown, you agree
to advise Mr. Arnold Rose of BBDO New York prior to cancellation
date.

NOTE: PLEASE HOLD PRINTING MATERIAL IN YOUR FILES FOR FUTURE USE.

NOTICE: "The compensation and other charges, if any, covered by this contract (order) shall be subject
to any adjustment required by the Economic Stabilization Order issued by President Nixon on August 15,
1971 or regulations or rulings thereunder or any additional Orders pertaining to the same subject matter.
Should it be determined that any compensation or charges are excessive under the Economic Stabilization
Order or any subsequent regulations or rulings thereunder, or any additional Orders pertaining to the same
subject matter, BBDO will seek recovery on behalf of its clients for such excessive compensation or charges.
Your acceptance of this contract (order) signifies your understanding of and agreement to the foregoing."

FORM NO. FOR. 302 N.Y. (REV. 1-73)

- PRODUCTION BILLING
INSTRUCTIONS
- Should any production charges be incurred
for inserting the advertising authorized by
this order, a separate bill MUST be ren-
dered.
 - Show client name, issue date, advertise-
ment number and this order number on
your bill.
 - Send bill for production charges to THIS
office—ATTN: Print Operations Department.
- Please do NOT include production
charges on your space bill.

REPRODUCTION MATERIAL should
match proof attached UNLESS proof is
marked "Identification only" — material is
correct. Please check. If proof and ma-
terial do not agree, contact

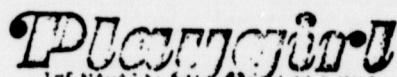
CARMEN MEDLA

By ROSE MILIONE

A 109

Exhibit F Annexed to Affidavit of William J. Miles, Jr.

ACKNOWLEDGMENT



PLAYGIRL INC. 1801 CENTURY PARK EAST, SUITE 2300
CENTURY CITY, LOS ANGELES, CALIF. 90067
(213) 652-8000

AGENCY

Batten, Barton, Durstine & Osborn, Inc.
375 Madison Avenue
New York, New York 10017

ADVERTISER

Philip Morris Tobacco Company
(Cigarettes)

THE FOLLOWING HAS BEEN RECEIVED:

| CONTRACT # | DATE | INSERTION ORDER # | DATE |
|------------|------|-------------------|--------|
| | | 11077 | 8/7/73 |

| ISSUE(S) | UNIT | KEY | RATE/FREQUENCY | PRODUCTION MATERIAL |
|---------------|------------------|-----|----------------|----------------------------|
| November 1973 | 1 pg. 4/color | | \$5,700.00 | Repeat of Sept. 1973 AD |

REMARKS

Mold printing material.
Tar and nicotine figures are a part of this advertisement.
Please send copies of magazine which includes this ad to:
Mr. C. Meola, New York.

Thank You

A 110

Exhibit F Annexed to Affidavit of William J. Miles Jr.

ORDER FOR ADVERTISING FROM

BATTE BARTON, DURSTINE & CO. DRN. INC.
363 MADISON AVENUE
NEW YORK, N.Y. 10017

CLW

NEW YORK No. 11076

AUGUST 7, 1973
DATE _____

TO ADV. DEPT. PLAYGIRL
SUITE 420
4055 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90010

PAPER NO. _____
CLIENT: 31 PRODUCT: 71

PLEASE INSERT ADVERTISING AS FOLLOWS

ADVERTISER THE AMERICAN TOBACCO COMPANY
PRODUCT TAREYTON AUTH. E-27 225#1

CHECK ONE (RATE & POSITION)

RATE CLASS: S. SCALE C.I.D.
FLAT ROP SPECIAL \$ RATE
POSITION: ROP PAID

| AD NO. | CAPTION | DATE OF INSERTION | SPACE ORDERED | TOTAL SPACE ORDERED | SPACE BILLING INSTRUCTIONS |
|--------|---|----------------------|-------------------------------------|---------------------------|--|
| 3-940 | US TAREYTON SMOKERS AD NO. (RISSELL) | DECEMBER, 1973 | 1 PAGE (7 x 10) 4 COLORS OFFSET | | Charge in accordance with BBDO Contract. |
| 3 | | | | | Send bills, in duplicate, to BBDO Accounting Services Division 383 Madison Avenue New York, N.Y. 10017 |

POSITION: BACK COVER.

MATERIAL: PROOF HEREWITHE FOR IDENTIFICATION. YOU HAVE MATERIAL AS THIS
IS A REPEAT OF AD SCHEDULED IN YOUR NOVEMBER, 1973 ISSUE.

NOTE: TAR & NICOTINE FIGURES AS OF FTC REPORT FEB '73 AND CAUTION NOTICE
ARE A PART OF AND M'LL BE INCLUDED IN THIS ADVERTISEMENT.

NOTE: PLEASE SEND A COMPLETE COPY OF MAGAZINE IN WHICH THIS ADVERTISEMENT APPEAR TO: MR. C. MEDOLA, BBDO, 383 MADISON AVENUE, NEW YORK,

NEW YORK, 10017 FOR REPRODUCTION CHECK.

NOTE: Separate this advertisement by at least six (6) pages from
any Cigarette or any advertisement which is incompatible to any of

our Cigarette advertising or which reflect adversely upon cigarettes

NOTE: Cigarette brands of our manufacture should be separated by
at least twelve (12) pages. NOTE: This advertisement is to be
positioned as specified, if unable to position as shown, you agree
to advise Mr. Arnold Ross of BBDO New York prior to cancellation
date.

Send copies of tear sheets
through your normal tear-
page distribution service or
directly to BBDO Accounting

PRODUCTION BILLING
INSTRUCTIONS

• Should any production charges be incurred
for inserting the advertising authorized by
this order, a separate bill MUST be ren-
dered.

• Show client name, issue date, advertise-
ment number and this order number on
your bill.

• Send bill for production charges to THIS
office—ATTN: Print Operations Department.

Please do NOT include production
charges on your space bill.

REPRODUCTION MATERIAL should
match proof attached UNLESS proof is
marked "Identification only — material is
correct." Please check if proof and ma-
terial do not agree, contact:

CARMEN MEDOLA

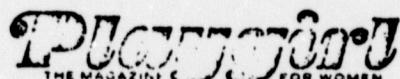
By ROSE MILIONE

NOTICE: The compensation and other charges, if any, covered by this contract (order) shall be subject
to any adjustment required by the Economic Stabilization Order issued by President Nixon on August 15,
1971, or regulations or rulings thereunder or any additional Orders pertaining to the same subject matter.
Should it be determined that any compensation or charges are excessive under the Economic Stabilization
Order or any subsequent regulations or rulings thereunder, or any additional Orders pertaining to the same
subject matter, BBDO will seek recovery on behalf of its clients for such excessive compensation or charges.
Your acceptance of this contract (order) signifies your understanding of and agreement to the foregoing.

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Exhibit F Annexed to Affidavit of William J. Miles Jr.

ACKNOWLEDGMENT



PLAYGIRL INC. 1801 CENTURY PARK EAST SUITE 2300
CENTURY CITY, LOS ANGELES, CALIF. 90067
(213) 553-8000

September 21, 1973

AGENCY

London, Astor, Bertine & Coopers, Inc.
305 Madison Avenue
New York, New York 10017
7211 Carmen Plaza

ADVERTISER

The American Tobacco Company
(Tareyton)

THE FOLLOWING HAS BEEN RECEIVED:

| CONTRACT # | DATE | INSERTION ORDER # | DATE |
|------------|------|-------------------|--------|
| | | 11076 | 9/7/73 |

| ISSUE(S) | UNIT | KEY | RATE/FREQUENCY | PRODUCTION MATERIAL |
|----------------|--------------|-----|---|---|
| December, 1973 | 1 pg/4/color | | \$11,000.00 per letter to Norman Omerick | Received 4-Some material as November, 1973 ad. |

REMARKS

Thank You

ADVERTISING DIRECTOR'S COPY

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EXHIBIT G--LETTER DATED SEPTEMBER 25, 1973 ANNEXED
TO AFFIDAVIT OF WILLIAM J. MILES JR.

Identical to Exhibit B annexed to Affidavit of
Norman H. Chester printed herein at page 24.

EXHIBIT H--LETTER DATED JULY 17, 1973 AND DUPLICATE
AGREEMENT ANNEXED TO AFFIDAVIT OF WILLIAM
J. MILES JR.

Identical to Exhibit I annexed to Defendant's
Memorandum of Law printed herein at pages 55 to 58.

EXHIBIT I--LETTER DATED DECEMBER 3, 1973 ANNEXED TO
AFFIDAVIT OF WILLIAM J. MILES JR.

Identical to Exhibit C annexed to Affidavit of
Norman H. Chester printed herein at page 25.

EXHIBIT J--LETTER DATED DECEMBER 13, 1973 ANNEXED TO
AFFIDAVIT OF WILLIAM J. MILES JR.

Identical to Exhibit D annexed to Affidavit of
Norman H. Chester printed herein at page 26.

EXHIBIT K--LETTER DATED DECEMBER 20, 1973 ANNEXED TO
AFFIDAVIT OF WILLIAM J. MILES JR.

Identical to Exhibit E annexed to Affidavit of
Norman H. Chester printed herein at page 27.

EXHIBIT L--LETTER DATED JANUARY 11, 1974 ANNEXED TO
AFFIDAVIT OF WILLIAM J. MILES JR.

Identical to Exhibit F annexed to Affidavit of
Norman H. Chester printed herein at page 28.

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EXHIBIT M--LETTER DATED JANUARY 17, 1974 ANNEXED TO
AFFIDAVIT OF WILLIAM J. MILES JR.

Identical to Exhibit G annexed to Affidavit of
Norman H. Chester printed herein at page 29.

EXHIBIT N--LETTER DATED JANUARY 25, 1974 ANNEXED TO
AFFIDAVIT OF WILLIAM J. MILES JR.

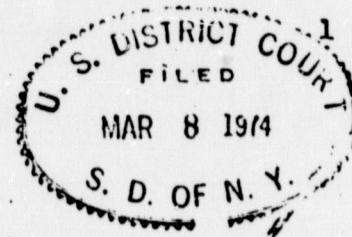
Identical to Exhibit H annexed to Affidavit of
Norman H. Chester printed herein at page 30.

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TRANSCRIPT OF HEARING ON MOTION FOR INJUNCTION

JQR

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



-----x
AMERICAN BRANDS, INC.,

74 CIV 948 CLB

Plaintiff, :

-vs-

PLAYGIRL, INC.,

Defendant. :

FINDINGS AND
CONCLUSIONS

-----x
11 Before

12 HON. CHARLES L. BRIEANT, JR.,

13 District Judge

14
15 New York, New York
16 March 6, 1974 - 2:15 p.m.

17 APPEARANCES

18 DANIEL J. O'NEILL, ESQ.,
19 Attorney for the Plaintiff.

20 ERIC CHUNG, ESQ.,
21 PETER COBRIN, ESQ.,
Attorneys for the Defendant.

Transcript of Hearing on Motion for Injunction

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2 [Case called.]

3 THE COURT: Good afternoon, gentlemen.

4 MR. COBRIN: May it please the Court, my name
5 is Peter Cobrin, and I am the attorney of record for the
6 defendant.

7 Before we begin I would like to move the
8 admission of Mr. Eric Chung, who is seated next to me. He
9 is a member of the California Bar and a member of the
10 District of Columbia and he is the principle counsel of
11 Playgirl, Inc.

12 I have known Mr. Chung since our law school
13 days and I can vouch for his character and ability and I
14 respectfully move his admission.

15 THE COURT: All right, for the purposes of this
16 application in any event.

17 You are a member of the Federal District Court
18 somewhere?

19 MR. CHUNG: The State of California and District
20 of Columbia.

21 THE COURT: Mr. O'Neill.

22 MR. O'NEILL: Your Honor, I represent American
23 Brands. This is an action for declaratory judgment for
24 specific performance of a contract and an injunction. It
25 was originally filed on behalf of American Brands in New

Transcript of Hearing on Motion for Injunction

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2 York County Supreme Court.

3 At that time we had an Order to Show Cause
4 signed by Judge Stark returnable before Judge Korn and we
5 held argument on whether or not a preliminary injunction
6 should issue against Playgirl Magazine for refusing to
7 accept and publish advertising copy of the plaintiff,
8 American Brands.

9 The Motion was argued before Judge Korn. We
10 had a conference in chambers with Judge Korn in an attempt
11 to resolve our problems. It was unsuccessful. Judge Korn
12 at that time gave the defendant until the 1st of March to
13 submit a supplemental brief and the matter rested there.

14 Thereafter, last week while I was out of town,
15 the defendant, Playgirl, removed this case from the State
16 Court to the Federal Court and it has been assigned to your
17 Honor.

18 Your Honor, in essence, we are dealing with
19 a motion for a preliminary injunction that was pending
20 when the action was pending in the State Court and, in
21 effect, is still pending before your Honor. I requested
22 on Monday that your Honor sign an Order to Show Cause to
23 bring this Motion to your Honor's attention and to get
24 counsel before your Honor for whatever further information
25 or papers your Honor might desire.

Transcript of Hearing on Motion for Injunction

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2 Your Honor, it's a simple action. Playgirl
3 Magazine, your Honor, is a relatively new publication.
4 Prior to publication, your Honor, they went around and
5 solicited -- through a man by the name of Carl Vance --
6 advertising.

7 One of the customers they came to is American
8 Brands. American Brands, if your Honor doesn't know, was
9 formerly known as the American Tobacco Company and
10 advertises in magazines throughout the country. At that
11 time American Brands signed a contract with Playgirl dated
12 January 26th, 1973. The provision in the contract that
13 we are concerned with, your Honor, is the last paragraph
14 of it which says, "Your acceptance below this agreement
15 shall also serve to acknowledge and understand that we
16 have the continuing and irrevocable right at our option
17 to buy the back cover of Playgirl each and every twelve
18 month period for each issue of Playgirl within that period
19 for as long a time as Playgirl shall continue to be
20 published."

21 This is the back cover of Playgirl and, I
22 submit, on a magazine like Playgirl, the back cover is
23 a walking billboard.

24 THE COURT: Yes, it's an advertisement.

25 MR. O'NEILL: Yes, your Honor, it is.

Transcript of Hearing on Motion for Injunction

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This contract was entered into sometime in the beginning of 1973 and thereafter American Brands submitted copy to Playgirl Magazine for publication. Playgirl published the copy on the back page, as you can see from this, and also accepted our money in payment therefore.

Along about September or October of 1973 Playgirl advised American that it was against their policy to honor the contract and that they would not give us the back cover. The reason why we are here on a Show Cause basis and asking for an expeditied ruling is that the first year of publication expires shortly.

The copy for the June issue of Playgirl has to be in by March 18 and American Brands wants its copy in the June issue, which closes out on March 18.

We have from the 6th, today, to the 18th. We would like, if possible, a ruling from his Honor.

THE COURT: You are asking for an equitable relief here, asking for an injunction.

MR. O'NEILL: Yes.

THE COURT: I signed your Order to Show Cause. I am very open minded about signing Orders to Show Cause where there is no temporary restraining Order stay contained. But I really think that you have a very important provisional issue here and you have to show me a couple

Transcript of Hearing on Motion for Injunction

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2 of things. You have to show me irreparable damages.
3 And the other thing you have to show me is whether if
4 you impose the hand of a court of equity or someone to
5 do a mandatory act such as directing him to publish the
6 magazine, in other words, this is an affirmative injunction
7 that you are seeking which almost, in my view on the face
8 of it, seems to border on involuntary servitude and
9 very similar to an attempt to get an injunction to compel
10 a workman to erect a building or someone to sing.
11 I think the classic case is when they tried to compel
12 the opera star to sing. I don't know that a court of
13 equity would, under ordinary circumstances, do that.

14 In having to compel something they have to
15 print it correctly in the proper layout and not smudge
16 the ink, so we have to oversee the printing of the magazine
17 and we have to have some showing of irreparable
18 damages. I would assume if there is a breach of contract
19 here that your client can mulct this defendant for
20 substantial money damages. Why isn't that an adequate
21 remedy?

22 MR. O'NEILL: We don't believe a money damage
23 remedy is adequate. This is a back cover of a magazine.

24 THE COURT: That is nonsense. You have to
25 show me how you cannot be adequately compensated. You are

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Transcript of Hearing on Motion for Injunction

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2 selling some merchandise and you paid a price for this cover?

3 MR. O'NEILL: Yes.

4 THE COURT: The cover has a value in excess
5 of the price, isn't that so? This right to be on this
6 cover of Playgirl is worth more money than you agreed to
7 pay for?

8 MR. O'NEILL: I am not sure I agree with that.
9 I am not sure that that is the way the advertising people
10 look at it.

11 Let me address myself to your Honor's points.
12 First of all, I am not looking in the sense to getting
13 the opera singer to sing. I am getting the magazine not
14 to publish anybody else's ad but mine.

15 THE COURT: They put on a totally blank cover --
16 what good does that do society?

17 MR. O'NEILL: They won't. They will accept
18 my ad and the money for my ad as a practical matter.

19 THE COURT: Mr. Chung came here from California
20 and I will hear him. I am disposed to deny your Motion
21 forthwith without hearing anything more.

22 MR. O'NEILL: Without reading the papers?

23 THE COURT: I have read the papers. I think
24 your position is ridiculous.

25 I just do not see how you can show irreparable

Transcript of Hearing on Motion for Injunction

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2 damages on this.

3 MR. O'NEILL: Can I address myself on the
4 irreparable damage point?

5 THE COURT: Pray do.

6 MR. O'NEILL: There is a tradition in the
7 advertising industry that if you have the front cover or
8 the inside cover or the back cover of a particular magazine
9 this month, when they are making up the copy of the
10 magazine for the following year, you are usually given a
11 right of first refusal on that same space. What happens
12 is that when new magazines start they go out and they
13 solicit business from various customers.

14 American Brands, being a national advertiser,
15 is solicited quite frequently. We took a gamble with
16 this magazine at the time we signed a contract with them
17 that they entered into with us, and this magazine was not
18 in publication. As part of that gamble we said, "All right,
19 we will go along with you, but we want an option on that
20 back cover."

21 We can't just walk into any other magazine
22 and say, "Give us the back cover for twelve months." They
23 have agreements with other advertisers whereby they are
24 committed. Because of the history of the relationship
25 between the magazine and the advertisers they are committed

Transcript of Hearing on Motion for Injunction

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2 to give that space or right of first refusal to that space
3 to their existing customers.

4 We are on the back cover of that magazine.

5 We have an agreement to the back cover of that magazine.
6 They signed that agreement and they published our ad
7 pursuant to that agreement.

8 Our position, your Honor, is that we can't
9 get money damages to adequately compensate us for it.

10 THE COURT: Why?

11 MR. O'NEILL: It's impossible to put a dollar
12 figure on what the value of that back cover is over and
13 above what we pay for it.

14 THE COURT: The back cover is being sold in the
15 marketplace, isn't it?

16 MR. O'NEILL: That is right.

17 THE COURT: People are paying different prices
18 for different magazines' back covers.

19 MR. O'NEILL: The back cover is printed
20 according to a circulation rate card that the publisher
21 of Playgirl puts out. Whatever the rate is, that is what
22 we pay. It's directly proportioned to the number of
23 copies they say they sell. If they sell 600,000 or
24 2,000,000 the rate varies.

25 THE COURT: Is his rate higher or lower or

Transcript of Hearing on Motion for Injunction

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2 different than another magazine in another topical area?

3 MR. O'NEILL: It is comparable to other
4 magazines with the same circulation.

5 THE COURT: All right.

6 Mr. Chung.

7 MR. CHUNG: Your Honor, as you have noted, there's
8 nothing unusual about a back cover of a magazine. American
9 Brands Company has no trouble whatever getting back covers
10 for magazines for their advertising. I stopped at the local
11 magazine rack this morning and picked these up. There
12 are six different magazines..

13 We contend that there is nothing whatsoever
14 unusual about any back cover. The rates --

15 THE COURT: Why won't you perform?

16 MR. CHUNG: Your Honor, the contract at issue
17 is void.

18 THE COURT: Why is it void?

19 MR. CHUNG: For several reasons, your Honor.
20 The first of which is that the contract lacks mutuality
21 of obligations.

22 THE COURT: It is signed in writing by the
23 party to be charged, the New York contract?

24 MR. CHUNG: The tobacco company has
25 reserved for themselves the right to cancel the contract

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Transcript of Hearing on Motion for Injunction

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2 at any time.

3 THE COURT: I don't think much of that argument.

4 Go onto the next one.

5 MR. CHUNG: The very clause which is being
6 relied on by the tobacco company --

7 THE COURT: It's an option in writing at the
8 very least, isn't it?

9 MR. CHUNG: If you read the contract carefully,
10 your Honor, I find that the use of the pronoun "our" is
11 used several times and it reads --

12 THE COURT: Why won't you publish their
13 advertising?

21 THE COURT: It says three years, doesn't it,
22 that they renew it for?

23 MR. CHUNG: No, sir. It's the contention of
24 the plaintiff that the contract gives them the right to
25 buy the back cover for their advertising for the life of

Transcript of Hearing on Motion for Injunction

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2 the magazine. The only exception would be, I suppose, if
3 the magazine dies.

4 MR. O'NEILL: It's every twelve-month period
5 with an option to renew.

6 THE COURT: In perpetuity?

7 MR. O'NEILL: Yes.

8 THE COURT: Where did I get the three year
9 figure?

10 MR. O'NEILL: I don't know, your Honor.

11 THE COURT: All right.

12 MR. CHUNG: Your Honor, there are several
13 precedents which I have --

14 THE COURT: I am only concerned today with
15 the question of whether they are entitled to this
16 injunctive relief pending a trial. They have a right
17 to bring a declaratory judgment if you people breach the
18 contract. They have a right to litigate that in a
19 leisurely fashion and you may be responsible for damages.

20 But I am only concerned today with the
21 preliminary injunction aspect here. This is a Motion
22 for a Preliminary Injunction.

23 MR. CHUNG: May I also point out to the Court,
24 your Honor, that the controversy here at issue was really
25 commenced in September of last year. The Plaintiff has

Transcript of Hearing on Motion for Injunction

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2 not taken any great haste in seeking this type of relief,
3 as a matter of course. They have seemingly been dilatory
4 in their attitudes. Playgirl has sought several times
5 in documentations attached as exhibits to the affidavit
6 submitted by defendant. They have refused steadfastly to
7 discuss this matter with Playgirl.

8 The settlement conference that was, for
9 example, instituted in Justice Korn's chambers was
10 short-lived. Plaintiff simply arrived, after requiring
11 the hearing to be put off a day, and simply advised Justice
12 Korn that they were not willing to settle. Now they
13 claim that there is a great urgency.

14 I think perhaps, your Honor, that the plaintiff
15 has been dilatory on purpose, to force Playgirl Magazine
16 to reach very close to its deadline for publication
17 without having this matter resolved. The choice, as
18 you point out, is either having a blank cover or attempting
19 to appease the plaintiff.

20 Your Honor, Playgirl contends that there is
21 no likelihood of success in this lawsuit by the plaintiff.
22 There is no urgency. At least, they have taken their
23 time in bringing this to a head with this hearing. They
24 will not suffer irreparable injury if this preliminary
25 injunction is not granted.

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2 Finally, for you to grant this injunction
3 would work a very great hardship on the defendant in that
4 certain commitments have been made to other advertisers
5 for this back cover.

6 THE COURT: For more money?

7 MR. CHUNG: No, your Honor, for the standard
8 rate, the rate for a magazine page.

9 THE COURT: Why would you do that? What is
10 the advantage to your client to give up regular contractual
11 relations with the plaintiff in order to sell the same
12 space to somebody else at the same price and be in the
13 middle of a lawsuit?

14 MR. CHUNG: Well, your Honor, as I sought to
15 explain, the back cover is sold as a package to other
16 advertisers in conjunction with other interior pages.
17 Typically, an advertiser would buy three, perhaps four
18 interior pages in the magazine for advertising and would
19 purchase one back cover. The magazine, therefore,
20 ends up selling several pages of advertising as compared
21 to simply one, the back cover.

22 May I also note, your Honor, that the plaintiff
23 does have the right to cancel. As a matter of fact, they
24 have exercised that right to cancel in the past. For
25 this Court to now order the defendant to print the

Transcript of Hearing on Motion for Injunction

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2 plaintiff's advertising -- well, it is within their very
3 power to simply nullify this Court's Order by cancelling
4 their advertising at their will.

5 THE COURT: Is there anything further?

6 MR. O'NEILL: Your Honor, if I may point out
7 to the Court the decision of Goddard against the American
8 Queen, and 1899 First Department - New York State
9 decision.

10 THE COURT: Do you have it with you?

11 MR. O'NEILL: It's in my brief which is in
12 the papers which are included. There the decision of
13 the Trial Court to deny a Motion for Preliminary
14 Injunction and advised that damages was the proper remedy
15 was overruled by the Appellate Division saying, "No
16 specific performance of a contract not to publish
17 competitor's advertising was the proper remedy."

18 THE COURT: That is a different fact.

19 MR. O'NEILL: I can't find a case that is on
20 all fours. That is the closest thing I can find.

21 THE COURT: That is a negative injunction
22 to prevent somebody from breaching a covenant to publish
23 his advertising?

24 MR. O'NEILL: Yes, your Honor. That is what
25 we are seeking.

Transcript of Hearing on Motion for Injunction

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2 THE COURT: I am prepared to make my findings
3 under Rule 65 with respect to this Motion.

4 I think the litigation here presented to the
5 Court presents fair ground for controversy. I think that
6 the issues can be litigated and that the Complaint ought
7 not to be dismissed on its face.

8 However, as far as concerns the question of
9 injunctive relief, I think that the plaintiff faces
10 insuperable difficulties.

11 In the first place, I think there is no showing
12 of irreparable damage that would not be compensable by
13 money damages. Advertising on magazines, as the Court
14 well knows, in this country is available to advertisers
15 and there are a number of magazines in business in this
16 area and elsewhere, and Playgirl is not the only one in
17 its field or the only one in the area.

18 Furthermore, if the Court were to issue a
19 mandatory injunction compelling the printing and publishing
20 of particular advertising, the Court would be called upon
21 to pass upon the acceptability of the editorial contents,
22 the layout, whether it was properly printed and not smudged
23 and to supervise the production of the magazine, in effect,
24 which prior case law -- which is well known, mostly
25 arising out of attempts for specific performance in the

Transcript of Hearing on Motion for Injunction

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2 contracts made in the construction industry equity --
3 ordinarily will not compel or direct the performance of
4 a contract requiring work, labor or services.

5 Furthermore, there is a question of the
6 balancing of the interest or the balancing of the equities
7 herein. Plaintiff's benefit, if he prevailed on such
8 a mandatory preliminary injunction pending trial, would,
9 in my opinion, be quite slight. He would have the benefit
10 of advertising for which he would pay the generally
11 going rate for advertising.

12 If, as alternatively suggested by the plaintiff,
13 we enjoined the defendant from accepting or printing
14 anyone else's advertisement on the back page of the
15 magazine with the result that the magazine would express
16 itself with a blank page, this would be a total loss as
17 far as the economy is concerned. It would be a waste of
18 available resources with no countervailing benefit to the
19 Courts or to the Plaintiffs.

20 I just believe that on the entire concensus
21 this is not a proper case for equitable relief pending
22 trial. I distinguish this case from a situation where
23 the magazine might have agreed that it wouldn't carry
24 a competitor's advertising. There I think such a
25 negative covenant could be enforced by an injunction

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2 which says to the parties, in effect, thou shalt not
3 do something. But here we are asked to compel them to
4 print or do so indirectly by compelling them not to print
5 anything else on the same space.

6 I think that is totally inappropriate and
7 inequitable and that the plaintiff shows no right to that
8 relief pending trial. I do not reach the question of
9 latches. I just don't think there is enough before me
10 to permit any such finding and I don't think that the
11 plaintiff is to be penalized on that ground.

12 Furthermore, I am not determining that the
13 Complaint does not state a cause of action. I think it
14 presents fair grounds for litigation. That is close
15 to the question of probability of success. But even if
16 I were convinced that they had a very substantial
17 probability of success, I would still believe that money
18 damages would be adequate and that he would have adequate
19 remedy.

20 Those represent the findings and conclusions of
21 the Court in this matter and the Motion is, in all respects,
22 denied.

23 I will say to you further, before you leave,
24 that I am entirely willing that this matter have a speedy
25 trial and the Order upon the making of this transcript --

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Transcript of Hearing on Motion for Injunction

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and it is so ordered -- is appealable under our Rules.
If you don't intend to appeal it, I think both sides
ought to cooperate and set forth a speedy schedule of
discovery and be ready to come in promptly and we will
hear this matter. If the ultimate trial of the case
shows that the plaintiff has rights in this regard, the
defendant shouldn't go along publishing and selling this
page to somebody else with impunity over any lengthy period
of time, so I will expect you to communicate with each
other and come before me in about a month and give me
or tell me how soon you will be ready for trial.

Those represent my findings and conclusions
under Rule 65 and it's so ordered.

MR. COBRIN: Thank you, your Honor.

MR. CHUNG: Thank you.

THE COURT: If there is some point that the
Court didn't deal with, I will hear you.

Is there anything the Court didn't cover?

MR. CHUNG: Nothing on the part of the
defendant.

THE COURT: Mr. O'Neill?

MR. O'NEILL: Nothing, your Honor. "

THE COURT: All right. Thank you, gentlemen.

SO ORDERED *Dated, New York City,
March 8, 1974
Charles L. Breyer
U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AMERICAN BRANDS, INC.,

Plaintiff-Appellant,

against

PLAYGIRL, INC.,

Defendant-Appellee.

State of New York,
County of New York,
City of New York—ss.:

DAVID F. WILSON , being duly sworn, deposes and says that he is over the age of 18 years. That on the 27th day of March , 19 74, he served two copies of Joint Appendix on Kirschstein, Kirschstein, Ottinger & Frank, Esqs: for Defendant-Appellee by delivering to and leaving same with a proper person in charge of their office at 60 East 42nd Street in the Borough of Manhattan , City of New York, between the usual business hours of said day.

Sworn to before me this

27th day of March , 19 74

COURTNEY J. BROWN
Notary Public State of New York
No. 31-5-72920
Qualified in New York County
Commission Expires March 30, 1974